No. 13,866

IN THE

United States Court of Appeals

For the Ninth Circuit

SOLON B. CLARK, JR., and GERALDINE A. CLARK,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

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Subject Index

Table of Authorities Cited

Cases

Statutes and Regulations

Miscellaneous

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JURISDICTION.

District Court jurisdiction of these claims depends upon the Tort Claims Act, 28 U.S.C.A. 1346(b). Jurisdiction in this Court depends upon 28 U.S.C.A. 1291.

STATEMENT OF THE CASE.

Between 4:00 and 4:30 P.M. on the afternoon of May 30, 1948, the western embankment at Peninsula Drainage District No. 1 in Multnomah County, Oregon suddenly failed under pressure of Columbia River flood waters. Within an hour, Vanport, a war housing project owned by the United States and located

in the drainage district, was completely inundated. Nearly all the Vanport residents, some 15,000 in number, were successfully evacuated. Fourteen or fifteen lives were lost, however, and considerable personal property belonging to the Vanport tenants was destroyed.

In due course, some 3,000 of the Vanport residents filed approximately 600 actions in the Oregon District Court asserting, under the Tort Claims Act, that the United States was responsible for the flood loss and asking damages of more than $6,000,000. When the period of limitations had expired, twenty of the cases, including this action, were selected as test cases on the liability issue and consolidated for trial. Counsel for the parties, after extensive discovery proceedings, prepared under the direction of the District Court a lengthy pretrial order defining the issues and stipulating to many of the relevant facts. The consolidated cases were then tried. Approximately 70 witnesses appeared and about 215 exhibits were introduced in evidence. Briefs were filed, the cases argued, and in due course the District Court announced its opinion in favor of the United States. Findings of fact and conclusions of law were prepared and filed and a judgment for the United States entered in this case and the nineteen cases consolidated with it.

Shortly before trial a stipulation dated August 6, 1951 was signed by the attorneys for all the Vanport litigants. This stipulation provided in detail the effect to be given in the other Vanport cases to any judgment thereafter entered in the twenty consoli-

dated cases. In general the theory of the stipulation was that the Vanport cases, other than the consolidated cases, would remain inactive on the docket of the District Court pending a final determination as to the liability of the United States. After the opinion below had been announced, the District Judge suggested that findings and judgment based upon this opinion be entered in all the 600 Vanport cases rather than in the consolidated cases alone. Pursuant to that suggestion the stipulation of August 6, 1951 was modified by a supplemental stipulation dated November 17, 1952 to provide that the findings and judgment in the consolidated cases should be deemed to be entered in all the cases. Furthermore, findings and judgment in summary form were physically signed and filed in each of the 600 cases.

This appeal is from a single judgment, the judgment entered in the twenty consolidated cases. The notice of appeal proceeds, however, on the theory that all the Vanport litigants have an interest in the judgment and it names as interested persons most of the Vanport plaintiffs. Since, however, there has been no appeal from the judgments signed and entered in the Vanport cases other than the twenty consolidated cases, it is by no means clear that any of the cases except the twenty consolidated cases are now open.

Appellants filed and this Court granted a motion to dispense with printing of the record. The references in this brief are, therefore, to the typewritten record (Tr.) and to the typewritten copy of the pretrial order (Pto.). Most of the pretrial order, to-

gether with a preliminary opinion of the District Court on pretrial procedures, is reported at 13 F.R.D. 340. The opinion below on the merits is reported at 109 F. Supp. 213. The findings and conclusions of law entered in the consolidated cases are printed as an appendix to this brief.

The issues before this Court are essentially, first, whether there is evidence in the record to support the no-negligence findings of the District Court and, second, whether the conclusions below on the legal issues are supported by the precedents. The Government believes that the record contains overwhelming proof of due care and that the legal principles announced below are thoroughly settled and everywhere accepted. Moreover, since the date of the District Court judgment, the Supreme Court has decided *Dalehite v. United States,* 346 U.S. 15 (1953) and that decision makes it plain that, leaving everything else aside, the District Court had no jurisdiction under the Tort Act to allow these claims.

1. Vanport and Peninsula Drainage District No. 1.

Vanport, where appellants were living on May 30, 1948, was constructed in 1942-3 by Kaiser Company, Inc. and its subcontractors (Pto. 30) to provide housing for persons engaged in war work in or near Portland, Oregon and particularly for employees of three shipyards in that area operated by Kaiser (Pto. 29). The project was built at Government expense on land belonging to the United States (Pto. 28). The cost to the Government for the land, the housing

and the furnishings was $25,750,000 (Pto. 32). Vanport was a large project—in truth, a small city. It provided sufficient housing for 38,000 people (Pto. 51). It had churches (Pto. 50), hospital facilities (Pto. 50), a fire department (Pto. 50), an independent water supply (Pto. 50), sewage disposal and storm drainage systems (Pto. 50), elementary schools under an Oregon school district (Pto. 50) and a resident representative of the Multnomah County Health Department (Pto. 50). Police operations were in charge of the Multnomah County sheriff, who maintained a Vanport office staffed with 25 men (Pto. 50).

Upon completion of construction, Vanport was leased by the United States to the Housing Authority of Portland (Exs. 349, 350, 351). This lease arrangement remained in effect until Vanport was destroyed by the flood. Under the lease the profit or loss from the operation of the property was profit or loss to the United States (Ex. 351) but selection of the tenants (Pto. 52) and the day to day management of the property was entirely in the hands of the Housing Authority and its employees (Pto. 47). The Housing Authority of Portland (HAP) was created December 11, 1941 by resolution of the City Council of Portland, acting under the Oregon State Housing Authorities Law (Pto. 34). HAP is a large organization operating a number of projects (Pto. 36; Ex. 351). On May 30, 1948 it had 675 employees (Pto. 48) working under the direction of Commissioners appointed by the Portland mayor (Pto. 47, 34).

Vanport was located within Peninsula Drainage District No. 1 (Pto. 5), a district organized about June 1, 1917 under the Oregon Drainage District Laws (Pto. 9) for purposes of reclamation and flood protection (Ex. 323). District No. 1 is situated on the outskirts of Portland, approximately 106 miles above the mouth of the Columbia River and approximately four miles above the confluence of the Columbia and Willamette rivers (Pto. 5). The district lies on the south shore of the Columbia and between the river and Oregon Slough (Pto. 5). On the west are lands subject to flood (Pto. 5); on the east, another drainage district known as Peninsula Drainage District No. 2 (Pto. 5). Except for a strip of high ground along the river, most of the district, consisting of 951 acres (Pto. 6), is below average flood height in the Columbia and in the absence of protecting embankments would be inundated during all flood stages of the river (Pto. 6).

In June 1917 when the district was organized, certain railroad fills on the west were already in existence and they became the western embankment of the district (Pto. 9). On the east the highway fill supporting Denver Avenue had already been constructed and it became the eastern embankment of the district (Pto. 9). The district itself constructed levees on the north and south. Those levees were built to a mean sea level (m.s.l.) elevation of thirty feet (Pto. 9) and designed to provide protection against a flood equal to that of 1876, then the second highest of record (Pto. 10). Funds for the work were obtained by levy-

ing assessments against the land within the district (Pto. 10). The district now has and ever since its organization has had power to arrange assessments to provide funds for the construction or maintenance of levees (Pto. 10).

The district work on the north and south levees was completed in 1918 (Pto. 9). In 1934 Congress was requested to provide additional flood protection for the Columbia River Basin (Pto. 11). In accordance with customary procedures,[1] Congress directed the Secretary of War to make a preliminary survey of the river and its tributaries (Pto. 11; 48 Stat. 954). The Corps prepared a report and by Section 5 of the Flood Control Act of 1936 (49 Stat. 1572), Congress directed the Chief of Engineers to raise and strengthen the north and south levees of District No. 1 (Pto. 11). Pursuant to this direction the Corps built a new river-

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[1]General O. E. Walsh, who was in charge of the Portland District of the Corps of Engineers in 1948, described those procedures:

> "The local people who feel that they have a flood problem they want to have solved apply to their representatives in Congress to have a study made, and Congress by either of two methods: One, a special legislative act for a new study, or a motion on the part of the Public Works Committee of either the House or the Senate, in case of a review study, directs the Chief of Engineers to make a study and report to the Congress what should be done to solve the problem. We hold public hearings to find out what the desires of the local people are, and then prepare a report and submit it to the Chief of Engineers. It is reviewed by the Board of Engineers of Rivers and Harbors. Their report, the District Engineer's report, and the Chief of Engineer's report, is then submitted to the House of the Congress that asked for it and hearings are held before the Public Works Committee. Then both Houses of the Congress act on it as they do any ordinary legislation, and it becomes law if passed by both Houses and signed by the President" (Tr. 808-9).

front concrete wall and reconstructed the earthen embankments (Pto. 12). The work of the Corps was completed in 1941 (Pto. 13) and control of the levees was formally surrendered to the district on September 15th of that year (Pto. 13; Ex. 327). The obligation to maintain and operate the levees has ever since rested exclusively with the district (33 U.S.C.A. 701c; Exs. 328, 329, 330). The work by the Corps of Engineers on the District No. 1 levees was confined entirely to the north and south levees (Pto. 12). The Corps has never had anything to do with the western embankment, the embankment which failed.

2. The western embankment at District No. 1.

The western embankment at District No. 1, the embankment which failed on May 30, 1948, consisted of two railroad fills and a highway fill joined together to constitute a single structure (Pto. 18). One of these fills (the S. P. & S. fill) was built in 1907-8 as part of the original main line construction of the Spokane, Portland & Seattle Railroad (Pto. 18). A trestle was built to assist in constructing the fill (Pto. 18) and the sand from which the fill was composed was dumped over and through the trestle work (Pto. 18). When the fill was completed, the trestle stringers were removed but the piling remained (Pto. 19). This same technique was used to build the second portion of the western embankment, the so-called Union Pacific fill (Pto. 16) which was constructed, again from sand, sometime between 1910 and 1918 (Pto. 16). The two railroad fills have been in regular and con-

tinuous use ever since they were first completed. The S. P. & S. fill is on the main line of that railroad and the Great Northern (Tr. 790). Over the years the traffic across the fill has steadily increased from an average of fourteen to an average of forty-five trains per day (Pto. 20), each weighing about 1,000 tons (Pto. 20). In a single month during the 1947 high water period, 1590 trains crossed the S. P. & S. fill, weighing a total of 2,951,214 tons (Pto. 21). The Union Pacific fill has also been in continuous use since it was first built, with the volume of traffic varying from one to twenty trains per day (Pto. 17). Under this continuous stress in both wet and dry seasons the railroad fills displayed no symptoms of weakness and only normal ballasting was required to maintain them (Pto. 17, 21).

Joined to the railroad fills to constitute the third portion of the western embankment was the North Portland Road highway fill constructed in 1933 by Multnomah County (Pto. 22). At the highway level this fill was separated from the railroad fills by a depression five or six feet deep and eight to ten feet wide (Pto. 22). Below the depression the highway fill joined with the railroad fills to constitute a single structure (Pto. 18). Like the railroad fills, the highway fill had been in continuous use since it was first constructed without symptoms of weakness (Pto. 23).

The western embankment was constructed for highway and railroad rather than levee purposes. But as far as resistance to water pressure is concerned, it is the method rather than the purpose of construction

which is important and railway and highway fills are frequently incorporated in flood protection systems. Twelve miles of railway fill and more than three miles of highway fill are included in the levee system of the lower Columbia alone (Tr. 818).

There was nothing about the western embankment or its history to suggest that it would fail under flood pressure. The embankment was built of sand and sandy material (Pto. 18, 19, 22), a thoroughly acceptable levee material (Tr. 704, 821, 966, 1002, 1027) used extensively in the levee systems of the United States (Tr. 966). Sand has, indeed, special advantages for levee purposes. It has high sheer strength, high stability and sufficiently high permeability to provide drainage (Tr. 966, 1003, 1027), thus relieving internal pressure in the levee (Tr. 821, 1003, 1027). The technique by which the embankment was built, that is, by loose placement methods, has proved entirely satisfactory for levee construction (Tr. 417, 971, 1006) particularly where as here the structure has had time to consolidate (Tr. 417, 971, 1007). Conventional construction practice in 1907 when the embankment was built called for clearing of the foundation materials (Tr. 789) and the S. P. & S. contracts so provided (Exs. 336, 337). Any unusually soft material in the foundation which was not removed in the clearing process would in normal course be displaced by the fill (Tr. 788) or compacted beneath it.

The western embankment was built, like all levees, on an area subject to overflow, and, like a great many

levees, over a slough or lake bottom (Tr. 411, 966, 1003). It rested on the natural soil of the area, sandy silt (Tr. 897). Levees are regularly built over all manner of soils (Tr. 704, 966, 1003) and the soil of District No. 1 has proved satisfactory not only for foundation purposes but for use in the levees themselves (Tr. 822).

The western embankment was built to a mean sea level elevation of 47.3 feet (Ex. 306). It had a crown width of 75 feet (Ex. 306), a base width of more than 300 feet (Ex. 306), and, at the water elevation at the time of failure, a thickness of 120 feet (Ex. 306). With these dimensions the western embankment was far larger than any other embankment at District No. 1 (Exs. 308-313) and far larger than most levees (Ex. 307). The normal District No. 1 levee section calls for a crown width of 12 feet (as compared to 75 feet for the western embankment), a base width of 120 feet (as compared to 300 feet for the western embankment) and a water elevation width of 30 feet (as compared to 120 feet for the western embankment) (Exs. 308-313).

In the years between 1907 and 1948 repeated high waters tested the capacity of the western embankment to resist pressure. Prior to 1933 when the highway fill was constructed (Pto. 22), the water rested directly against the railroad fills and the pressures then experienced were not radically different from the 1948 pressure. In 1921 the water elevation was 27.4 feet m.s.l. as compared with 30.8 feet at the time of failure; in 1922, 25.6 feet; in 1923, 22.8 feet; in 1925,

24.5 feet; in 1927, 26.1 feet; in 1928, 27.6 feet; and in 1932, 23.8 feet (Pto. 25). After the highway fill was added to the embankment the high water continued: in 1933, 27.7 feet; in 1934, 19.3 feet; in 1935, 20.1 feet; in 1938, 23.7 feet; in 1942, 18.6 feet; in 1946, 23.6 feet; and in 1947, 23.1 feet (Pto. 25). The fact that the western embankment over the years had demonstrated its capacity to withstand flood pressure is, of course, an important reason why no failure was anticipated (Tr. 1035).[2]

3. The 1948 flood fight.

High water in the Columbia River is an annual occurrence (Pto. 3) and not infrequently the water elevation reaches flood stage (Pto. 25). The State of Oregon, its agencies and subdivisions, are therefore thoroughly familiar with flood fighting and its problems. In 1946 at the suggestion of Red Cross the Oregon Governor instructed the Oregon State Disaster Coordinator to collaborate with other Oregon officials in preparing a plan for disaster operations

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[2]Dr. Arthur Casagrande, Professor of Soil Mechanics at Harvard University, testified in this connection as follows:

> "The most reliable predictions are always made on the basis of the behavior of a structure. If we have a building that has stood in a certain locality and has behaved in a certain manner, we can rely on that experience more than we can on soil testing. And so it is with an embankment. If an embankment of the size as described has stood for that many years, and is exposed to that particular head of water, it makes no difference, in my opinion, what is in the foundation or in the embankment. The embankment and the foundation have both been tested in a manner better than I could by testing samples, and on the basis of that experience record I would judge under those conditions the embankment would be safe." (Tr. 1035).

(Pto. 58). The plan was completed and widely distributed (Pto. 58). In April 1948 Red Cross and Oregon cooperated in conducting a conference at Salem to discuss problems of disaster and disaster relief including flood problems (Pto. 58). The State Disaster Coordinator and representatives of various government agencies attended the conference (Pto. 58).

The April 1948 snow survey of the Columbia River Basin disclosed a normal snow cover and no serious flood condition was anticipated (Tr. 816, 817). By May 1st, however, the snow cover had increased materially and a flow of 650,000 c.f.s. was expected (Tr. 817). In actual fact the 1948 flow reached a peak of more than a million feet (Tr. 817) and the flood proved to be the second largest in the history of the river (Pto. 55). More than 50 cities and towns were affected to a greater or lesser degree by the high water (Pto. 73). Forty-one persons lost their lives; 70,000 people were rendered homeless; more than 400,000 acres were inundated; and the property damage has been estimated at $100,000,000.00 (Pto. 73). The flood fight involved 475 miles of levee protecting 200,000 acres of land (Pto. 73). On the lower Columbia alone, 61 drainage and diking districts were affected (Pto. 73). The flood developed suddenly. Before May 27th there was nothing to indicate that the 1948 water elevations would exceed the 27 foot levels which had been reached on numerous occasions in the past (Pto. 54).

As the high water approached District No. 1, arrangements were made to handle the flood problem. Crews were obtained from the railroads, industrial organizations in the area and the Housing Authority of Portland (Pto. 69). The Housing Authority alone had 400 men (Tr. 567) and, with Vanport college students (Tr. 568) and volunteer workers, the labor supply was virtually unlimited (Tr. 567). Bags, hay, tarpaulins, hand tools and sand were available in large quantities (Tr. 569). Passenger cars, pick-up trucks, dump trucks, graders, tractors and bulldozers were also on hand (Tr. 568). Trucks were loaded with hay and sand and placed on a standby basis with keys in the locks (Tr. 569). Elaborate systems for patrolling the levees were arranged and placed in operation. The Vanport precinct of the sheriff's office patrolled the embankments night and day (Pto. 61). HAP established a second patrol in which about fifty professional fire fighters participated (Tr. 572). The patrols were first by car (Tr. 572) and eventually on foot (Tr. 573) both at the top and the toe of each structure (Tr. 573-4) with inspectors passing the wet portions of the embankments every five minutes (Tr. 573). Along the western embankment a third patrol was established by S. P. & S. maintenance men (Tr. 838). In addition to these formal patrols, special inspection trips were frequently made by representatives of HAP, the district, the railroad companies and the Corps of Engineers. As a practical matter, the embankments at District No. 1 during the high water period were under virtually con-

tinuous inspection and there is no suggestion in the record that any development, significant or insignificant, passed unnoticed.

In Vanport, arrangements were made to give an alarm if the occasion arose (Tr. 570-1). An air raid horn (Pto. 71), the siren on the administration building (Pto. 71), and the sirens attached to the motor equipment of the sheriff's office and the fire department were available for this purpose (Tr. 571). A sound truck was stationed near the administration building ready for immediate use (Tr. 570).

During the week preceding the failure on Sunday, May 30, 1948 flood developments at Vanport were as follows.

Monday and Tuesday, May 24th and 25th: Highly qualified engineers, including representatives of the Corps of Engineers (Tr. 881, 879, 893-6), began routine checking of the flood fight preparations under way in the various drainage districts, including District No. 1. There the levees were inspected (Tr. 500-504) and there was a general review of preparations for the flood fight (Tr. 561).

Wednesday, May 26th: The Columbia River stood at 25.6 feet, with a Sunday prediction of 27.8 feet, an elevation approximately equal to the highest water of recent years (Pto. 54-5). In view of the anticipated high water, representatives of many of the property owners in District No. 1 met at the Portland Union Stockyards during the afternoon to discuss the situation (Pto. 69). A committee was

appointed with authority to approve any major expenditure which might be required (Pto. 70). There was no suggestion at the meeting that the embankments were inadequate or that Vanport was in danger or should be evacuated (Pto. 70). In downtown Portland, Red Cross representatives communicated with the mayor and the sheriff and made general preparations for the flood light (Pto. 65-6). General Walsh of the Corps of Engineers wrote to the President of District No. 1 calling his attention to the high water and the responsibility of the District "for the operation and maintenance of all the flood control works" (Ex. 331).

Thursday, May 27th: The Oregon Disaster Coordinator, upon notification by Red Cross that Columbia backwaters flooding the Willamette were requiring evacuation of low areas in Portland (Pto. 58), arranged for temporary shelters (Pto. 58) and alerted the agencies responsible for the Oregon disaster plan (Pto. 58). The Pacific Area Director of Disaster Service for Red Cross, with offices in San Francisco (Pto. 66), received a report of the situation and decided to go to Portland (Pto. 66). The Corps of Engineers made field assignments of all experienced personnel (Tr. 881). Corps representatives were sent to approximately thirty drainage districts in the Columbia River Basin (Tr. 881). A message center was established in the Portland office of the Corps (Tr. 884) and arrangements were made to have field reports circulated through the office (Tr. 884). Throughout the flood period Corps personnel devoted

as much as sixteen hours a day to flood work (Tr. 884).

Friday, May 28th: Jack R. Hayes, the Oregon Disaster Coordinator and the representative of the Oregon Governor, was in touch with the Portland situation by telephone (Pto. 59) and he decided to come to Portland to attend meetings scheduled for Saturday. The Red Cross Disaster Director arrived in Portland with members of his staff—about fifty persons in all (Pto. 66). There was a second meeting of the property owners of District No. 1 (Pto. 70). Again there was no suggestion that the embankments were inadequate or that Vanport was in danger or should be evacuated (Pto. 70). On Friday morning, Kenneth R. Dibblee, a Corps engineer with seventeen years of experience (Tr. 939), arrived in Vanport (Tr. 515) pursuant to his assignment to Districts Nos. 1 and 2 to "contact the local interests, local supervisors there, in an advisory capacity in regard to the protective measures that were being performed in their flood fight" (Tr. 940). At District No. 1 he inspected both the north and south levees (Tr. 515) and the toe and both shoulders of the western embankment (Tr. 516). Mr. Dibblee remained in the area during the day, paying particular attention to such work as was then in progress (Tr. 516-17).

Saturday, May 29th: After preliminary meetings with Mr. Hayes, the Oregon Disaster Coordinator (Pto. 59), Red Cross called the meeting at which

it was decided to issue the bulletin appellants criticize (Pto. 66). The meeting was held in Portland (Pto. 66) and attended by Mr. Gordon, Red Cross Director of Disaster Service for the Pacific Area, and other Red Cross executives (Pto. 67), by the Chairman of the Board of County Commissioners of Multnomah County (Pto. 67), by the Multnomah County Sheriff and one of his deputies (Pto. 67), by a representative of the Multnomah County Health Office (Pto. 67), by Tom Ward, a Housing Authority employee (Pto. 67), and by Mr. Hayes, acting for the Oregon Governor (Pto. 67). No employee of the United States was at the meeting (Pto. 67).

Under the direction of a Red Cross representative, the meeting reviewed the flood situation, concluded that there did not appear to be any "immediate danger or need for evacuation" (Tr. 914a) and then, as a precautionary measure, went on to consider the "problems we were going to encounter if it became necessary to evacuate" the 15,000 people living at Vanport (Tr. 935). Problems of housing, food, bedding and public health were considered (Tr. 914a). Since the flood crest was predicted for Tuesday (Tr. 914a) another meeting was planned for Monday (Tr. 915) at which additional information was to be provided (Tr. 915). The meeting then considered the problem of providing information to the Vanport residents (Tr. 915) and after a number of possibilities were considered and rejected (Tr. 915) it was decided that a bulletin should be distributed (Tr.

916). The contents of the bulletin were agreed upon[3] and Mr. Ward, the HAP representative, agreed to prepare and distribute it (Tr. 916). Pursuant to this understanding, Mr. Ward returned to Vanport, prepared the bulletin on the basis of notes taken at the meeting (Tr. 918), reviewed it with the Vanport project manager, and made arrangements for distribution (Tr. 919). The bulletin, as distributed to the Vanport residents late Saturday night, read as follows:

> "TO THE RESIDENTS OF VANPORT
>
> Read this carefully and keep it in case you need to refer to it.
>
> The flood situation has not changed since the prediction made last Thursday that the highest

[3]In this connection Mr. Ward testified:

"First of all, they wanted a report on the over-all situation, which from Mr. Valentine and with the concurrence of others,—the Sheriff and others—was not materially different than it had been on Thursday when they predicted that the flood would crest the following Tuesday. That situation was unchanged. We wanted to alert the people to not create a panic, to give them an idea of the plans that were being made for evacuation, to tell them where to go—and at that time the most likely places seemed the Denver Avenue fill or the railway embankment, those being the two which we understood would be the safest, and since we felt that anyone in the project would get to one or the other of those embankments without undue difficulty. We mentioned that the transportation facilities would be provided. We urged that they register if they were leaving the project for any reason in order that we would have some means of notifying relatives or friends in other parts of the country who might be concerned about them. We suggested—and this was at Dr. Weinzirl's specific recommendation—that we advise any of the handicapped or infirm to leave the project if they could conveniently do so; if not, to register at the Sheriff's office so that we would know where they were in order to give them assistance in getting out, if necessary." (Tr. 916-7.)

water would come next Tuesday, that the dikes were high enough and strong enough to withstand the crest, and that barring unforeseen developments VANPORT is safe.

However, the Housing Authority is taking every possible precaution to protect the personal safety of every Vanport resident in the event of emergency. The plan outlined is as follows:

1. In the event it becomes necessary to evacuate Vanport, the Housing Authority will give the warning at the *earliest possible moment,* upon the advice of the U. S. Army Engineers. Warning will be by siren and air horn blown continuously.

2. Sound trucks will give instructions on what to do. Those instructions briefly are as follows:

A. Don't get panicky! You have plenty of time. Take such valuables as money, papers, jewelry. Wear serviceable clothing, and pack essential personal belongings and a change of clothing in a small bag. *Do not try to take too much.* Turn off lights, stoves, close windows, lock the door.

B. If you have a car, observe traffic regulations. Carry as many people as you can.

C. If you haven't a car go toward DENVER AVENUE, or the RAILROAD EMBANKMENT, whichever is closest. Portland Traction buses will operate in the project or on Denver Avenue, depending on conditions, to take persons to places of emergency shelter. Upon arrival at shelter, the Red Cross will assume responsibility for registration and for emergency food, shelter,

and clothing. The county health department will provide emergency medical care. Cases of sickness, old age, or disability where special assistance will be necessary in case of evacuation should be reported now to the Sheriff's Office. Such cases, if they can conveniently do so, are encouraged to leave Vanport now for the next few days.

Also, persons who *for any reason* are leaving Vanport to be away for several days are urged to register at the Sheriff's Office before leaving. This will help to answer inquiries from anxious friends and relatives who do not know where you are.

REMEMBER:
DIKES ARE SAFE AT PRESENT
YOU WILL BE WARNED IF NECESSARY
YOU WILL HAVE TIME TO LEAVE
DON'T GET EXCITED!"

During Saturday events at District No. 1 took their regular course. Engineers from the district, the Housing Authority and the Corps toured the levees (Tr. 519-520) and reviewed flood conditions generally (Tr. 520). Two assistants were assigned to Mr. Dibblee at Vanport and they so arranged their working schedule that some Corps representative was always in the area (Tr. 521).

Sunday, May 30th: During the morning the Portland office of the Union Pacific received a report of seepage through the western embankment (Tr. 864). The roadmaster and the terminal trainmaster went immediately to District No. 1 to inspect the fill (Tr.

864). They made, on foot, a detailed inspection both along the toe and along the top of the fill (Tr. 868-9). About 200 feet north of the area of eventual failure they found a small boil or boils (Tr. 868) and talked with a Vanport fireman, who was patrolling the fill (Tr. 870). The fireman returned to Vanport to report (Tr. 870) and the Union Pacific representatives continued their inspection. There were no boils, cracks or other unusual developments in the area of eventual failure (Tr. 871) and there was nothing to suggest any weakness in the embankment (Tr. 872).

On Sunday morning an S. P. & S. section foreman discovered that at a point north of the area of eventual failure and adjacent to the boils (Tr. 484) one of the S. P. & S. tracks had settled slightly (Tr. 485). The foreman reported to the S. P. & S. trainmaster (Tr. 483) who told him to raise the track (Tr. 483). A slow order, the customary railroad procedure for track irregularities (Tr. 840), was put into effect (Tr. 483). About 10:30 A.M., the foreman watched a train cross the low spot "to see whether the fill was safe, whether it was solid enough to let trains over okey" (Tr. 488). "The train didn't seem to put the track down any more than it was" (Tr. 488). During the morning, the foreman saw a crack fifteen or twenty feet long, a quarter of an inch wide and a few inches deep (Tr. 477) located on the inside shoulder of the Union Pacific fill and parallel with the track. The foreman left the fill at 3:50 P.M. Sunday afternoon (Tr. 489), about a half hour before the failure. He testified he had seen nothing to indicate the embankment might fail (Tr. 489).

The boil report reached Carl Thomas, Chief Engineer for the S. P. & S. Mr. Thomas, who knew all about the western embankment (Tr. 786, 789) and who was thoroughly experienced with railroad fills in flood periods (Tr. 785), made a careful inspection of the western embankment beginning about one o'clock Sunday afternoon (Tr. 791). He inspected the boils (Tr. 797) and was satisfied they were responding to treatment (Tr. 791-2, 797). He also inspected the crack discovered by the section foreman (Tr. 792-3, 799). There was nothing significant, in his opinion, about the crack (Tr. 793). He testified he had seen similar cracks in railroad fills "quite frequently; every time we have high water along the Columbia River" (Tr. 793).[4] Mr. Thomas left the western embankment shortly before 4:00 P.M. (Tr. 794) and hence within a few minutes of the failure. He testified he had seen nothing to suggest that the fill might fail or that traffic over the fill should be stopped or that the railroad passengers crossing the fill were in any way unsafe (Tr. 795). Other S. P. & S. representatives who were on the western embankment Sunday afternoon testified to the same effect. The witnesses include another section foreman who, with a crew of men, worked on the embankment during the afternoon (Tr. 860); the S. P. & S. assistant master carpenter, who made care-

[4]Mr. Thomas explained the crack as follows:

"Well, we attribute these cracks to what we call a kind of outside slip. There is no question but what moisture has a little bit to do with it. But the outside of a fill, the very outside, is not compacted like the fill is itself, and when there is any moisture, as there is from a high water, there is a tendency for the outside to slip. But it very seldom, if ever, carries back into the fill itself." (Tr. 794).

ful inspections of the fill, including observations of its reaction to the weight of the trains which were crossing it (Tr. 853-5); and an S. P. & S. telegrapher, who only a few minutes before the failure occurred climbed the Vanport side of the western embankment at the exact location of eventual failure (Tr. 460). No one saw anything to suggest trouble (Tr. 860, 853-5, 460).[5]

In addition to the Sunday inspections by personnel of the railroad companies, the western embankment was inspected that day by the president of District No. 1 and its former engineer (Tr. 555-6), by engineers of the Housing Authority (Tr. 557), once more by the one-time district engineer (Tr. 558) and by a representative of the Corps of Engineers (Tr. 509). Each testified that he saw nothing to suggest that the embankment might fail or that Vanport was in any danger (Tr. 558, 509, 510).

The failure: The western embankment failed between 4:00 and 4:30 P.M. on Sunday afternoon (Pto. 71). The failure was so sudden and unexpected that two railroad employees standing on the embankment were carried into the water (Tr. 854-5). The flood waters, after first filling the sloughs and drainage system of the Vanport area (Pto. 71), advanced eastward across the district approximately at the rate a

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[5]On Sunday and for sometime prior thereto the Union Pacific and the S. P. & S. were under technical "seizure" by the United States in connection with a labor controversy and Army representatives had been assigned to the Portland office of the companies (Pto. 75-79). The Army representatives did not participate, however, either in the flood fight or in the management of the railroads (Pto. 77).

man walks (Pto. 71-2). It took from 45 to 75 minutes for the district to fill (Pto. 72).

Representatives of the sheriff's office, of HAP and of the Vanport fire department saw the failure (Pto. 71) and reported immediately to their respective organizations (Pto. 71). The sheriff's deputies manned their equipment and, together with three engines from the Vanport fire department, circulated through Vanport operating their sirens and giving the alarm (Pto. 71). The sound truck which had been stationed near the administration building joined in this work; and the siren on the administration building and the air raid horn were placed in operation (Pto. 71). In response to the alarm the Vanport residents made their way across the project and on to Denver Avenue. During the night and thereafter Red Cross provided housing and food to the evacuees (Pto. 67). The Red Cross flood relief payments in Multnomah County totaled $2,012,469.07, a part of which went to the residents of Vanport (Pto. 67).

The cause of the failure of the western embankment is unknown (Tr. 334, 437, 799, 975, 1009, 1031). The possible explanations include "a soft bottom" (Tr. 550), voids or piping (Tr. 696), foundation difficulties (Tr. 437), variations in the permeability of different portions of the structure (Tr. 975), a small fault (Tr. 1032) and liquefaction (Tr. 1032), but these are only unverified speculations and recognized as such. Never before has an embankment

of similar size and composition failed under comparable water pressure (Tr. 973, 1030, 1045-46).

This account of the Vanport failure, presented here in summary fashion, was presented to the lower Court at length and in detail. Nearly seventy witnesses testified. Some of these witnesses were called by appellants; some by appellee. They agreed, however, in saying that there was no reason to expect that the western embankment would fail; that there was no reason to believe Vanport was in any danger; that there was no reason to suggest an evacuation. In the light of this testimony the Court below concluded, and the Government believes necessarily concluded, that there was no negligence and hence that appellants have no claim.[6]

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[6]Much of the material included in appellants' statement of the case is erroneous. Vanport was built not by FPHA (p. 5) but by Kaiser (Pto. 30). Appellants were not tenants of the United States (p. 6); they were tenants of the Housing Authority (Exs. 393, 396, 397). Appellants received no assurance "that the dikes would hold" (p. 6); the bulletin said only that "*barring unforeseen developments* Vanport is safe" (Ex. 364). The Corps of Engineers was not "without any knowledge whatsoever" (p. 7) or "utterly and completely ignorant and uninformed" (p. 27) or "without knowledge of" (p. 32) or completely lacking in "knowledge of the composition and stability of" the western embankment (p. 34); the Corps representatives knew the size of the embankment (Tr. 820, 880, 881, 894, 940), that it was composed of sandy material (Tr. 821, 885, 896, 940), that it had been built for railroad purposes (Tr. 823, 885, 896-7, 941), that railroad fills are frequently built by dumping materials through a trestle (Tr. 885, 897, 941) and that it had withstood prior periods of high water (Tr. 823, 885, 896, 940). The Corps also knew about foundation conditions since the Corps had used the soil of the district to reconstruct the north and south levees (Tr. 882, 885, 897). Appellants say muddy water was running along the side of the western embankment (p. 7); but the witness who so testified did not claim to have investigated the source of the water (Ex. 199, pp. 52-3) and muddy water in this drainage ditch was an ordinary occur-

SUMMARY OF THE ARGUMENT.

The judgment below should be affirmed:

First. Because the finding that there was no negligence or wrongful conduct by those who participated in the flood fight is fully supported by the record. There is no evidence that anyone knew or could have known that Vanport was in danger. There is no testimony criticizing what was done in the flood fight or suggesting that anything of significance was left undone. The persons who participated in the flood fight were expert, fully informed, diligent and careful.

Second. Because there were no "false assurances of safety". Appellants were warned that an evacuation of Vanport might become necessary and the statements appellants criticize were in fact accurate

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rence (Tr. 601). There was no crack in the top of the fill three days before the break (p. 8); a careful inspection on Sunday morning of the area of eventual failure disclosed no cracks, boils or anything unusual (Tr. 870, 871, 877). The crack which appeared during the course of the day was not four or five inches wide (p. 8); it was about a quarter of an inch wide (Tr. 477, 792, 799). The boils in the western embankment were not at the area of failure (p. 8); they were 200 feet to the north (Tr. 868, 797, 859). The boils were not unattended (p. 8); they received the traditional ring levee treatment to which they responded in satisfactory fashion (Tr. 791-2, 797, 859). The Vanport side of the embankment was not so covered with brush as to make inspection impossible (p. 8); the western embankment was repeatedly inspected (Tr. 868, 869, 791, 555-7). The opinions expressed to the cause of the failure (p. 8) were in fact only speculation and the witnesses so recognized (Tr. 334, 437, 799, 975, 1009). To date the failure is unexplained (109 F. Supp. 226). The report by Mr. Dibblee does not suggest "errors and mistakes of the United States Army Engineers" (p. 10); it only makes recommendations for future flood fights in the light of the Vanport experience (Ex. 12). The District No. 1 levees were not "all leaking badly" (p. 26); they were displaying only normal seepage (Tr. 522) which readily responded to treatment (Tr. 902-3, 944-9).

The case which appellants have briefed is not this case.

and careful. Those statements, moreover, were not made by employees of the United States and there is no proof appellants relied upon them.

Third. Because negligent representations are not actionable in Oregon or under the Tort Act.

Fourth. Because the United States neither had nor assumed any duty to appellants.

Fifth. Because flood fighting is discretionary activity upon which no claim can be founded under the Tort Act.

Sixth. Because alleged negligence of public officials in a period of public peril is not actionable.

Seventh. Because Congress has expressly provided (33 U.S.C.A. 702c) that the United States shall not be liable for flood damage.

Eighth. Because appellants assumed the risk of flood loss.

The Vanport flood, like any other public catastrophe, brought in its wake a host of rumors. These cases were filed in reliance on those rumors. The trial developed the facts, destroyed the rumors and demonstrated that the claims are without merit.

ARGUMENT.

A. THERE WAS NO NEGLIGENCE.

Liability under the Tort Act depends upon proof of negligence or wrongful conduct (28 U.S.C.A. 1346 (2)(b); *Dalehite v. United States,* 346 U.S. 15, 55

(1953)). The Court below, fully aware of the importance of the negligence question, made a painstaking examination of the record and entered extensive findings rejecting all charges of negligence or wrongdoing in connection with the flood fight. The District Judge found:

> "6. At approximately four thirty on Sunday afternoon, May 30, 1948, and when the flood water in the Columbia River stood at an elevation of 30.8 feet, m.s.l., the western embankment at Peninsula Drainage District No. 1 suddenly failed. The failure resulted from a break in the embankment rather than overtopping. The failure was so rapid and unexpected that railroad employees who were inspecting the embankment were precipitated into the water. Within an hour the whole Vanport area was flooded. The houses in Vanport were damaged beyond repair and personal property belonging to the Vanport residents, including property of the plaintiffs, was destroyed by water damage as a direct result of the break. Fourteen lives are reputed to have been lost but about 16,000 people were evacuated safely.
>
> 7. The western embankment was constructed, owned and operated by the railroad companies and not by the United States. At the point where the embankment failed it had an elevation of 47.3 feet, a crown width of 75 feet and a thickness of 120 feet at the water level. It was much larger in section than the other embankments surrounding Vanport and at the time of failure the water was more than 15 feet from the top of the structure. Although the embankment has

been examined in detail, together with the character of the ground where it was built and the materials and methods used in its construction, the cause of the failure has not been shown and appears to be unknown.

Prior to 1948 the western embankment had withstood the floods of 1933 of 27.7 feet, of 1928 of 27.6 feet, of 1921 of 27.4 feet and other floods of less height. The alleged fact that there were decayed timbers in the fill and that ordinary sand was used in its construction has not been proved to have had any effect. No one thought there was a possibility that the western embankment would fail since it was higher, broader, less subjected to pressure of water and was thought to be better consolidated because of the pressure of tremendous weight which it continuously bore. The United States did not own, construct, maintain or operate the western embankment which failed under pressure of the Columbia River Flood waters on May 30, 1948. This embankment had been constructed, maintained and operated by the Railroad Companies for many years and was used for carrying trains of enormous weight up to the very moment of disaster and was not constructed primarily for the purpose of flood control. It was also protected by a highway fill of less height which ran between it and the river under ordinary water conditions. No cause for the failure of the western embankment has been proved. No act or omission of the United States, the Corps of Engineers, the Housing Authority of Portland, the railroads and the agencies, officers or employees of any of them in connection with the flooding of plain-

tiff's property was without due and ordinary care. No act or omission of any such person or entity above named was the cause of the flooding of the property of the plaintiff.

The Corps of Engineers, the engineers of the railroad companies who had charge of the original construction and present management of the fill, the Housing Authority of Portland and its executive and administrative employees, together with the representatives of the State, community and national relief organizations, as well as individual residents of Vanport who testified at the trial, all saw no reason to apprehend danger and all believed that the western embankment would stand. No care or precaution could have given notice that any break would occur. There has been no proof of negligence in connection with the construction, maintenance or operation of the western embankment.

8. The Corps of Engineers is an agency or instrumentality of the United States in its sovereign capacity. For many years the Corps has helped to protect the nation from floods. Many levees and embankments have been constructed by the Corps or under its supervision. During the 1948 Columbia River flood, as on innumerable other occasions, the Corps, owing to the high competence of its officers and engineers, helped in the effort to control the flood waters not only in the Vanport area but up and down the Columbia River for a distance of five hundred miles. In that connection the Corps gave general publicity to the approaching high water and maintained a careful and consistent inspection of the areas and dikes involved, including those

at Vanport. Within the limits of available personnel, the Corps also gave technical advice and assistance to those participating in the flood fight. However, the Corps did not take charge of the flood fight at Vanport; nor did the Corps attempt to guarantee the safety of the dikes at Vanport or elsewhere. All the acts done and advice given by the Corps and its representatives and employees in this situation of widespread peril to the public were honest and competent. No negligence on the part of the Corps of Engineers, its employees or representatives, has been proved. The Corps of Engineers and its representatives neither had nor assumed any obligation to be responsible for the safety of the Vanport residents or their property and no duty was imposed upon the United States by the activities of the Corps.

9. On May 30, 1948, the properties of the Spokane, Portland and Seattle Railway Company and the Union Pacific Railroad Company were under technical 'seizure' by the United States in connection with a labor dispute resulting in an alleged national emergency. The 'seizure' of the properties of these railroads was a fiction of the flimsiest kind. That 'seizure' did not in fact affect in any way the ownership or control of the railroads or their properties, including the ownership or control of the western embankment at Vanport. No duty on the part of the United States to maintain the western embankment for flood protection purposes, or at all, arose out of this so-called 'seizure'. Moreover, no act or omission of any employee of the railroads has been proved which constituted negligence. The

officers and employees of the railroads, whether under federal control or not, acted in the light of all available knowledge as to the construction of the fill, the materials used and the nature of the underlying ground. As operators of railroads they acted with respect to the safety of their passengers and freight under a duty almost absolute. Yet trains passed over this fill at the regularly established intervals all during the flood period and up until half an hour before the break occurred. The United States did not build, maintain or operate the western embankment and had no responsibility therefor. Inspections of the embankment were made with meticulous care. Precautions were taken. All the indicia of disaster now pointed up by the event were appraised at the time by the railroads' representatives in the light of their duty to their own passengers and freight and of their knowledge of the nature of the fill. The event proved them wrong but not negligent.

* * * * *

11. No negligence on the part of the Housing Authority or its agents or employees has been proved. They carefully inspected the embankments surrounding Vanport and took care of weaknesses which developed or assisted others therein. They established patrols of the embankments and kept watch of the height of the water on all sides. Efficient arrangements were made, moreover, for the evacuation of all persons in the case of necessity. The proof of the care used in this regard is that Vanport was evacuated unexpectedly in a period of about an hour of some 16,000 people with small loss of life."

The Vanport situation received, of course, continuous attention from those who were participating in the flood fight: from Red Cross, which was receiving reports from a surveyor and about fifty amateur radio operators operating mobile units in the flood area (Pto. 68); from the officials of District No. 1 who inspected the levees on Sunday morning (Tr. 555-7); from the Vanport precinct of the sheriff's office which was conducting an independent patrol of the levees and embankments (Pto. 61); from the Multnomah County Commissioners, who received information from the sheriff (Pto. 63); from the representative of the Oregon Governor who received information from the sheriff (Pto. 63) and from Red Cross (Pto. 67); from property owners in District No. 1 who held meetings to review the situation (Pto. 69-70) and participated in the inspection trips around the levees (Tr. 519); from the engineers and roadmasters of the railroads who made meticulous examinations of the western embankment (Tr. 864-872, 785-799, 852-857); from the executives and engineers of HAP who arranged for a patrol of the levees (Tr. 572-575) and who participated in the inspection trips (Tr. 519-521); from representatives of the Corps of Engineers assigned to Districts Nos. 1 and 2 (Tr. 519-521, 499-508); and, of course, from the Vanport residents themselves, who visited the levees in great numbers (Tr. 794). Not one single person saw any reason to believe that Vanport was in danger. The failure came as a complete surprise. It was so sudden that men standing on the embankment in apparent

safety were carried into the water (Tr. 854-5). It was so unexpected that two passenger trains were about to proceed across the embankment when it failed (Tr. 845).

The persons who shared the view that Vanport was in no apparent danger were expert, careful and, contrary to appellants' extravagant assertions, fully informed. They include: 1. Appellants' witness, *John Suttle,* one-time district engineer (Tr. 550) and the man who built the north and south district levees (Tr. 552). Mr. Suttle had personal knowledge of the original construction of the western embankment and he supervised completion of the construction of that embankment in 1917 (Tr. 551). He made regular inspection trips around the levees during the high water period (Tr. 553) and twice inspected the western embankment on Sunday (Tr. 555-7). He testified that he did not think Vanport was in danger (Tr. 558). 2. *Carl Thomas,* Chief Engineer for the S. P. & S. (Tr. 784), a graduate, licensed engineer (Tr. 784) who for thirty years had been personally familiar with the western embankment (Tr. 789) and with company records showing how it was constructed (Tr. 786). Mr. Thomas spent Sunday afternoon on the embankment for the express purpose of inspecting it (Tr. 790-794). He testified that he believed passengers riding across the fill that afternoon were entirely safe (Tr. 795). 3. *N. S. Westergaard,* S. P. & S. Road Master (Tr. 836) who, like Mr. Thomas, was thoroughly experienced with railroad fills in flood periods (Tr. 836, 837) and familiar with the western

embankment construction records (Tr. 836). Mr. Westergaard received detailed reports of the condition of the embankment (Tr. 838-844) and permitted traffic to flow without interruption over the fill (Tr. 844). He too believed that the Sunday passengers were safe (Tr. 844-5). 4. *Harold Martinsen,* Assistant Master Carpenter for the S. P. & S. (Tr. 852), who during the hour preceding failure carefully inspected the western embankment (Tr. 855) checking its reaction to traffic (Tr. 855) and who, anticipating no failure, was standing at the location of the break when it occurred (Tr. 854-5). 5. *George E. Cunningham* and *Paul Williams,* S. P. & S. section foremen, who did maintenance work on the fill on May 30 and preceding days and who saw no reason to anticipate failure (Tr. 478-489, 859-862). 6. *Carl Saling* and *R. L. Rickard,* Road Master and Trainmaster for the Union Pacific, who on Sunday morning made an elaborate inspection of the toe and crown of the entire western embankment, including the area of eventual failure, without seeing anything to indicate weakness (Tr. 868-872; 875-877). 7. *Roy Taylor,* Assistant Director of Management for HAP, and *C. S. McGill,* Maintenance Engineer for HAP, who participated in the daily inspection trips (Tr. 561-65; 592-9) including a Sunday inspection of the western embankment (Tr. 598-599). They heard no suggestion and saw no reason to believe that the western embankment might fail or that Vanport should be evacuated (Tr. 582-583; 600). 8. *Harry K. Doyle* of the Corps of Engineers, one of the most experienced flood control engineers in

America (Tr. 893-6). During the week prior to failure, Mr. Doyle visited Vanport each day, inspecting each location at which any significant development had occurred (Tr. 499-508). He neither saw nor heard anything to indicate that the western embankment might fail (Tr. 903); he saw no reason to suggest evacuation of Vanport (Tr. 903) and no one made that suggestion to him (Tr. 903). 9. *Kenneth R. Dibblee* of the Corps, another experienced engineer (Tr. 939), who, beginning Friday, spent a large portion of each day inspecting the District No. 1 embankments (Tr. 514-522). Nothing Mr. Dibblee saw or heard suggested to him that the western embankment might fail (Tr. 945) or that Vanport should be evacuated (Tr. 945).

This on any standard is an impressive list of witnesses. It includes virtually everyone who was informed about the flood situation at District No. 1. It includes witnesses for both appellants and appellee. It includes the best talent of the railroad companies, the district and the Corps of Engineers. And there is no disagreement. No one could see any reason to believe that Vanport was in danger.

Appellants, as a matter of fact, do not seriously contest this fundamental proposition of no apparent danger. They argue, rather, that they received "false assurances of safety" and go on to suggest that in the absence of such assurances they would have left Vanport. Nothing in the record supports either the argument or the suggestion. To begin with, there were no

assurances of safety, no promises that "the dikes would hold" (Br. p. 6). On the contrary, the statements to which appellants refer go no further than to say that there is no apparent danger but each carries a warning that the situation might change. The Friday Journal (Ex. 421) said "There is nothing at present to indicate that the dikes will not hold, but every precaution is being taken". The Saturday Journal (Ex. 422) quotes the Vanport project manager as saying, "We are taking every precaution but we do not expect any danger" and adding "Ample warning will be given if real danger develops". The Sunday Journal (Ex. 423) carried a story entitled "No Vanport Danger" and then in bold type "BUT PREPARATIONS MADE—'IN CASE' ". The Saturday Oregonian (Ex. 430) contains a statement "Neither is Vanport City in any foreseeable danger" and adds "Preparations are being made to care for Vanport's 25,000 inhabitants if the situation should change". On Sunday the Oregonian (Ex. 431) quoted the Vanport manager "We feel there is no cause for worry, but we are not overlooking what might occur" and again, "We don't want to alarm Vanport residents but the people should be aware of the situation and be ready to move if it has to be done. Every precaution should be taken to prepare for emergency evacuation of invalids and children." Thus the newspapers. Clearly there is here no guarantee of safety. There is only a statement—and a true one—of no present indication of danger, coupled in every instance with a plain warning that the situation might change.

The bulletin distributed to the Vanport residents on Saturday night says the same thing: that there is no apparent danger but that an evacuation may be necessary. Of this bulletin, the District Court said:

> "There is here no contract nor guarantee that the river will not flood Vanport. The express language assures safety only at the moment of issue. It does not assure any one that there will be no flood on Tuesday nor on Sunday. * * * The bulletin very positively told each of these plaintiffs that, if a flood came, they would be warned in time to get out themselves, but that they could save no property at all, unless one happened to be on the spot at the time and then he could save only his most valuable possessions and a change of clothing. 'Don't attempt to take too much', in the circular, rings the death knell of these claims." (109 F. Supp. 226).

The bulletin in substance was not an assurance of safety; it was a plan for evacuation. And appellants were well aware of that fact. The plaintiffs below uniformly testified that they understood from the bulletin that an evacuation might become necessary (Tr. 31, 42-3, 52, 74, 86, 109, 120, 130, 140, 150, 158, 172, 177-8, 182, 192, 202, 217, 228, 237, 247, 255, 264, 274, 284, 292-3, 303-4, 340, 351, 355, 536). The false assurances of safety of which appellants complain simply do not exist.

Nor were these so-called assurances of safety assurances from the United States or its employees. Thirty-eight of the Vanport plaintiffs testified at the trial (Tr. 28-378). Each was carefully examined as

to the source of his flood information. As might be expected, that information was obtained from family and friends, from the bulletin and from the newspapers and radio (Tr. 30, 42, 44, 49, 77, 84, 111, 119, 128-9, 138-9, 149-50, 157-8, 171, 176, 183-4, 191, 200, 216, 226-7, 236, 249, 259, 264, 277, 285, 291-2, 303, 311, 339, 348, 355, 536). No one of the plaintiffs claimed to have communicated with or received advice from any representative of the Corps of Engineers during the flood period (Tr. 28-378).

The bulletin was not the work of the United States or its employees. No representative of the Corps, no employee of the United States, attended the Red Cross meeting (Pto. 67) or had anything to do with the bulletin (Tr. 827, 904, 946). Red Cross, Mr. Hayes, representing the Oregon Governor, the County Sheriff and the Chairman of the Board of County Commissioners met and decided to issue the bulletin in terms then agreed upon (Pto. 67). HAP participated but its participation was purely mechanical and confined to the physical preparation and distribution of the document. Naturally enough the HAP representatives were willing to do what the Oregon officials thought best, but those officials, not HAP, are responsible for the bulletin and its contents. To the extent, therefore, that appellants base their claims upon the bulletin, the claims should be addressed to Red Cross or to Oregon, not to the United States. Nor, needless to say, can the United States be held responsible for newspaper accounts. The suggestion that the United States should pay millions of dollars of damages be-

cause of obscure and casual references in the Portland newspapers to the Corps and to HAP is too frivolous to warrant discussion.

The record discloses another objection to appellants' assurance-of-safety argument. It is suggested that absent the bulletin and the newspaper comment, the Vanport plaintiffs or some of them would have left the project (Br. p. 41). The record contains no support for this suggestion. No one of the plaintiffs so testified. Not one of them claimed that at any time he made plans to leave or to remove his property (see, for example, Tr. 81, 125, 133, 287) or suggested that his actual conduct was in any way affected by what the bulletin or the newspapers had to say (Tr. 28-378). Appellants' argument that the cause of their damage was not the flood but alleged assurances of safety is entirely unproved and more than a little disingenuous.

Since there were no assurances of safety, false or otherwise, since such statements as were made were not the work of the United States or its employees and since those statements did not, on the record, actually affect the conduct of anyone, it makes little difference how much or how little the Corps representatives knew about the western embankment. The fact is, however, that appellants' extravagant charges that the Corps was "without any knowledge whatever" (p. 7) and "completely ignorant and uninformed" (p. 27) are wholly untrue. The conclusion that Vanport was not in any apparent danger was not the conclusion of the Corps representatives alone. It was the conclusion of everyone. It was, for example, the con-

clusion of appellants' witness, John Suttle, who for many years had been engineer for Districts Nos. 1 and 2 (Tr. 550). Mr. Suttle built the north and south levees of the district (Tr. 552) and he knew as much about the western embankment as any man could. He was in the area when work on the embankment began (Tr. 551); he had charge of completing the embankment in 1917 (Tr. 551); and since he joined in the regular inspection trips (Tr. 553-7) he knew of all developments. What more was there to know? Mr. Thomas and Mr. Westergaard of the S. P. & S. also had complete information. Each had years of personal familiarity with the western embankment (Tr. 789, 836) and each knew from company records how and from what materials it had been constructed (Tr. 787, 837). Mr. Westergaard received detailed reports of developments during the flood period (Tr. 838-844); Mr. Thomas spent Sunday afternoon on the embankment itself (Tr. 790-4). Both men were fully confident of the strength of the structure and both, obviously, were fully informed. The Corps of Engineers representatives, General Walsh, Mr. Ragsdale, Mr. Doyle and Mr. Dibblee, all with wide engineering and flood fighting experience, also knew everything of significance about the western embankment. They knew its size (Tr. 820, 880, 881, 884, 940), that, as anyone could see, it was composed of sandy material (Tr. 821, 885, 896, 940), that it had been built for railroad rather than levee purposes (Tr. 823, 885, 896-7, 941), that railroad fills are frequently built by dumping material through a trestle (Tr. 885, 897, 941), and

that it had withstood prior periods of high water (Tr. 823, 885, 896, 940). The Corps knew, of course, about foundation conditions at District No. 1 since it had used the natural soil of the area to reconstruct the north and south levees (Tr. 822, 885, 897). Complaints that these witnesses lacked information are frivolous and the Court below was quite right in rejecting them. "All acts done and advice given in this situation of widespread peril to the public were honest and competent" (109 F. Supp. 223).

It is significant, moreover, that although appellants argue that during the flood period important data about the western embankment was missing, they do not suggest what that data might be nor have they provided it for the record. The western embankment still stands, ready for investigation. Foundation conditions at District No. 1 can be explored by anyone with a mind to do so. Yet appellants have learned nothing new—nothing the railroads, the district, the Corps and HAP did not know in May, 1948. Appellants' failure to bring to court the information which they say should have been available during the flood fight is the best possible proof that no such information exists.

Finally, it should be noted that this record demonstrates affirmatively that there is nothing whatever about the western embankment or its history which would or could have given warning of failure. The pre-trial order contains complete and detailed information as to the method of construction, the history and condition of the western embankment (Pto. 15-

24). Five of the most highly qualified flood control engineers in America, asked to assume the facts stated in the pre-trial order and having in mind the developments of the flood period, all agreed that there was nothing to suggest Vanport was in danger. The witnesses so testifying were: 1. *Thomas M. Middlebrooks,* Chief of the Soils Branch of the Corps of Engineers (Tr. 961). Mr. Middlebrooks has been responsible for the design of between 75 and 100 earth dams (Tr. 962) and, since 1927, for all levees constructed by the Corps (Tr. 963). In that connection he has approved or reviewed the design for between 1500 and 2000 miles of levee (Tr. 964). Mr. Middlebrooks testified that he knew of no other instance in which a structure of the size and composition of the western embankment had failed under comparable water pressure (Tr. 973); that he would not have expected the western embankment to fail (Tr. 974); that he would not have recommended evacuation (Tr. 974); and that, assuming a failure were to occur, he would have expected it to be gradual and to continue over a minimum period of a number of hours (Tr. 974). 2. *Robert R. Philippe,* Chief of the Soils and Cryology Branch, Military Operations, of the Office of the Chief of Engineers (Tr. 998). Mr. Philippe until recently was Chief of the Ohio River Division Laboratories at Cincinnati (Tr. 998). He has done extensive consulting work (Tr. 1000); he has had experience with 70 or 75 earth dams (Tr. 1000) in the design stage and with about 50 such dams in the construction stage (Tr. 1000); and he has designed or supervised the design of about forty flood protection projects along the Ohio

River (Tr. 1001). Mr. Philippe testified that he had never known of a comparable failure (Tr. 1007); that he would not have expected failure (Tr. 1007); that he would not have recommended evacuation (Tr. 1008-1009); and that, assuming the western embankment were to fail, he would have expected that the failure would have been gradual "over a period of hours or probably longer" (Tr. 1008). 3. *Dr. Arthur Casagrande,* Professor of Soil Mechanics and Foundation Engineering at Harvard University (Tr. 1022) and one of the principal contributors to the development of modern soil mechanics (Tr. 1023). Dr. Casagrande has done consulting work for Columbia, Argentina, Canada and the Panama Canal (Tr. 1024); he has had experience with the construction of about 20 earth dams (Tr. 1024); he has done research in connection with the design and construction of levees (Tr. 1025), including employment by the Mississippi River Commission to make a special study to improve levee design (Tr. 1025). Dr. Casagrande testified that he had never known of an instance in which an embankment of the size of the western embankment had failed under comparable water pressure (Tr. 1030); that he would not have expected failure (Tr. 1031); that he would not have recommended evacuation (Tr. 1031); and that if failure were to occur he would have expected it to occur gradually, "a matter of several hours at least" (Tr. 1030). 4. *Willard J. Turnbull,* Chief of the Soils Engineering Division of the Waterways Experiment Station at Vicksburg (Tr. 1042). Mr. Turnbull said he has never known of an embank-

ment such as the western embankment to fail under comparable water pressure (Tr. 1045-1046); that he would not have expected failure (Tr. 1044) or recommended evacuation (Tr. 1045); and that he would have expected the failure, if any, to have taken place over a period of "several hours and possibly days" (Tr. 1044). 5. *Julian Hinds,* General Manager and Chief Engineer of the Metropolitan District of Southern California, an organization which provides water to 35 cities (Tr. 403) and which owns a series of canals and aqueducts 500 miles in length (Tr. 404) for which Mr. Hinds is generally responsible (Tr. 404). Mr. Hinds has practiced engineering for more than 40 years (Tr. 404-6); he has worked in connection with approximately 50 dams (Tr. 406); and he has designed and supervised the construction of thousands of miles of canals and embankments, including training walls and levees (Tr. 406). Mr. Hinds testified that he would not have expected the western embankment to fail (Tr. 422); that he would not have recommended the evacuation of persons living behind it (Tr. 423); and that, if a failure were to occur, he would anticipate that it would take place "over several hours at least" (Tr. 421).

This testimony is from the best men in the business. It is uncontradicted. It is proof positive that no amount of information, no amount of engineering talent could have provided a warning of the Vanport flood. The people conducting the flood fight were as diligent, as careful and as wise as human capacity permits. They were not negligent.

B. NEGLIGENT MISREPRESENTATIONS ARE NOT ACTIONABLE UNDER THE TORT ACT OR IN OREGON.

By insisting that their case depends on false assurances of safety, on talk rather than conduct, appellants raise insuperable law obstacles to their claim. Liability under the Tort Act (28 U.S.C.A. 1346(b)) depends upon proof of loss "caused by the negligent or wrongful act or omission of any employee of the Government". The reference, it will be noted, is to an "act or omission", not to a statement or representation. Indeed, the statute goes on expressly to provide (28 U.S.C.A. 2680(h)) against District Court jurisdiction over:

> "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights".

Plaintiffs pitch their case squarely on "false assurances of safety" (Br. p. 16). Surely any such false assurance of safety is a misrepresentation. Under the plain language of 28 U.S.C.A. 2680(h), a claim thus founded cannot be heard. In *Jones v. United States,* ..... F. 2d ....., decided October 28, 1953, the Court of Appeals for the Second Circuit so held. A complaint charging in two counts deceit and negligent misrepresentation was dismissed by the trial court as outside the jurisdiction conferred by the Tort Act. On appeal, the order was affirmed by an opinion reading in full as follows:

"FRANK, Circuit Judge:

Plaintiffs' second cause of action asserts wilful misrepresentation. This claim is clearly barred by Sec. 2680 (h) of the Act. See United States v. Silverton, 200 F. (2d) 824 at 826 (C. A. 1). We think the first cause of action, for negligence, is also barred. Section 2680 (h) prohibits suits against the government on claims arising out of 'assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.' Since 'deceit' means fraudulent misrepresentation, 'misrepresentation' must have been meant to include negligent misrepresentation, since otherwise the word 'misrepresentation' would be duplicative. The construction is strengthened by the inclusion of libel which may be either negligent or intentional.

"The defendant has raised a number of other arguments in its briefs which we need not consider.

"AFFIRMED."

The Missouri District Court in a suit arising out of the Kansas City flood has reached the same conclusion. See *Mid-Central Fish Co. v. United States,* 112 F. Supp. 792 (1953). Appellants have rested their case on a claim that cannot be heard.

Even if a negligent representation were actionable under the Tort Act appellants would not be materially aided. Oregon law controls (28 U.S.C.A. 1346(b)) and the Oregon courts apparently refuse to recognize a claim based upon a representation which is merely

negligent. *Medford National Bank v. Blanchard,* 299 Pac. 301 (Ore. 1931); *Sharkey v. Burlingame Co.,* 282 Pac. 546 (Ore. 1929). Compare *Coughlin v. State Bank of Portland,* 243 Pac. 78 (Ore. 1926). In any event, the Oregon decisions have settled the rule that statements of opinion or representations as to matters of judgment are not actionable. *Hansen v. Holmberg,* 156 P. 2d 571 (Ore. 1945); *Horner v. Wagy,* 146 P. 2d 92 (Ore. 1944); *Ward v. Jenson,* 170 Pac. 538 (Ore. 1918). It can hardly be denied that a representation as to the condition of an embankment or as to the possibility of a flood is an expression of judgment or opinion. In Oregon, such a representation by a private person, even though negligent, would not be actionable. There is, therefore, no liability upon the United States.

Even this is not an end to the difficulties appellants make for themselves by basing their case on talk rather than conduct. Liability for negligent advice, even in those jurisdictions where it is recognized, is carefully confined to those plaintiffs to whom the defendant, as a part of a commercial arrangement, owes a duty to make representations or give advice. *Ultramares Corporation v. Touche,* 174 N.E. 441 (N.Y. 1931); *Renn v. Provident Trust Co. of Philadelphia,* 196 Atl. 8 (Pa. 1938); *National Iron & Steel Co. v. Hunt,* 143 N.E. 833 (Ill. 1924); *Landell v. Lybrand,* 107 Atl. 783 (Pa. 1919); *Advance Music Corporation v. American Tobacco Co.,* 268 App. Div. 707, 53 N.Y.S. 2d 337 (1945); *O'Connor v. Ludlam,* 92 F. 2d 50 (C.C.A. 2 1937); *Candler v. Crane, Christmas &*

Co. [1951] 2 K.B. 164; 120 A.L.R. 1262; 74 A.L.R. 1153; 34 A.L.R. 67; 8 A.L.R. 462. Certainly there is nothing in the books to suggest that the relationship between a Government employee and a private person will support a claim for damages on account of negligent advice. Moreover, on more than one occasion the courts have denied recovery to a plaintiff who in direct reliance upon negligent representations as to his safety has suffered serious injury. *Holt v. Kolker,* 57 A. 2d 287 (Md. 1948); *Webb v. Cerasoli,* 275 App. Div. 45, 87 N.Y.S. 2d 884 (1949), aff'd 300 N.Y. 603, 90 N.E. 2d 64; *Spurling v. LaCrosse Lumber Co.,* 220 S.W. 707 (Mo. App. 1920).

In the Court below appellants stated and argued a number of grounds of alleged negligence (Pto. 83-87d). Apparently all are now abandoned in favor of a claim of misrepresentation and negligent advice. But to insist, as appellants now insist, that their case depends upon statements rather than conduct is simply to demonstrate that the alleged negligence, even if proved, would not be actionable—certainly not under the Tort Act.

C. THERE WAS NO DUTY OWING FROM THE UNITED STATES TO APPELLANTS.

In Oregon, as elsewhere, negligence is actionable only if defendant has a duty to plaintiff. "Actionable negligence must be predicated upon the breach of a legal duty." *Freer v. City of Eugene,* 111 P. 2d 85, 87 (Ore. 1941). "A necessary element of actionable

negligence is the existence of a duty on the part of defendant to protect the plaintiff from the injury complained of." *Todd v. Pac. Ry. & Nav. Co.,* 117 Pac. 300 (Ore. 1911). In its conclusions, the Court below recognized this rule of Oregon law

> "4. Under the law of Oregon there are three requisites for recovery of damages: (a) a duty incumbent upon the defendant, (b) a breach of that duty by the defendant and (c) injury and damage resulting proximately from the breach of duty."

and went on to say:

> "5. Neither the United States nor any of its agents or employees owed a legal duty to protect plaintiffs' property under the circumstances of these cases."

Appellants, to succeed here, must show not only that the no-negligence findings are without record support but also that this no-duty conclusion is against the precedents.

1. The United States had no responsibility for appellants' property or for the District No. 1 embankments.

In American government problems of property protection and personal safety are police power problems. They are, therefore, problems for the several states. For, as everyone knows, the United States, under the Constitution, has no police power. *Hamilton v. Kentucky Distilleries Co.,* 251 U.S. 146, 156 (1919); *Patterson v. Kentucky,* 97 U.S. 501 (1878). This means that under the federal system the 1948

flood was an Oregon problem, not a United States problem.[8]

During the high water period Oregon recognized and discharged its police power responsibilities. The state disaster plan was placed in operation (Pto. 58); the Governor's representative was either in Portland or in close touch from Salem (Pto. 58-60); the County Commissioners were active and informed (Pto. 63); the sheriff's office patrolled the embankments (Pto. 61) and advised Vanport residents as to flood conditions (Pto. 62); Mr. Hayes, the sheriff and the Chairman of the Board of County Commissioners, acting in cooperation with Red Cross decided to issue the bulletin and agreed on its contents (Pto. 67). After the failure the Governor declared a state of limited emergency (Pto. 59) and the Oregon National Guard, in cooperation with the State Police and the sheriff, took charge of the area (Pto. 63-64). The following day it was the Oregon Governor, not the United States, who ordered the evacuation of Peninsula District No. 2 (Pto. 60). Thus it is clear enough both in theory and in fact, that if and to the extent any government official had or undertook responsibility for the safety of appellants or their property, those

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[8]This normal distribution of responsibility was not affected by the fact that the United States owned Vanport. The lease from the United States to the Housing Authority of Portland expressly provided that Oregon should retain both civil and criminal jurisdiction over the premises (Ex. 351, p. 28). Since Oregon law was fully applicable at Vanport (Pto. 61) a precinct of the Multnomah County Sheriff's office was established there to enforce it (Pto. 61).

officials were Oregon officials, not employees of the United States.

Just as the United States had no responsibility for the safety of the Vanport residents, it had no responsibility for the strength or integrity of the embankments surrounding District No. 1. The district was organized for the avowed purpose of providing "where necessary, proper and suitable dikes to prevent the overflow of Columbia River and Columbia Slough and Oregon Slough." (Ex. 323). It had full power to construct and maintain levees to prevent flood damage (*United States v. Florea,* 68 F. Supp. 367 (Ore. 1945); *In re Scappoose Drainage District,* 237 Pac. 684, 239 Pac. 193 (Ore. 1925)) and to obtain the necessary funds through tax assessments. 123 O.C.L.A. 122; Pto. 10; *United States v. Florea,* 68 F. Supp. 367, 376 (Ore. 1945). The Government was obligated to pay its share of the expense (Ex. 351, p. 15). Moreover, the Government title to the Vanport property was subject to the "rights of Peninsula Drainage District No. 1 and its employees to enter upon said premises for the purposes of maintaining, altering or repairing the dikes, ditches or other facilities of said District * * * and to take any other reasonable steps necessary to protect said District against leakage, overflow, bank destruction and flood waters" (Pto. 27). Since in May, 1948 the United States neither owned nor controlled the western embankment and since the work done by the Corps on the north and south levees had long since been com-

pleted and the levees returned to the district, the responsibility for the district embankments, wherever it rested, was not with the United States.

2. The Corps of Engineers owed no duty to appellants.

Congress has recognized that flood control is in the national interest (33 U.S.C.A. 701a) but it has confined the activity of the Federal Government in that connection to the construction of flood control structures such as dams and levees (33 U.S.C.A. 701o, 702). On May 30, 1948 the Corps had no instruction from Congress to participate in flood fights or to assume responsibility for the safety of persons and property in a flood area.[9] This does not mean that the Corps should stand idle during a flood. The Corps, because of its construction work, has in its employ engineers equipped to provide technical advice on flood fighting problems. It is customary for the Corps to make this advice available to those actually in charge of the flood fight (Tr. 811-3; Ex. 64).

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[9]An appropriation act had provided the Secretary of War with limited funds to use, if he saw fit, for actual rescue work and the maintenance of structures imperiled by flood conditions. 33 U.S.C.A. 701n then read as follows (60 Stat. 652):

> " 'That the Secretary of War is hereby authorized to allot, from any appropriations heretofore or hereafter made for flood control, not to exceed $2,000,000 for any one fiscal year to be expended in rescue work or in the repair or maintenance of any flood-control work threatened or destroyed by flood.' "

This authority, it will be noted, relates only to levee repairs and rescue work, problems unrelated to the problems before the Court. The authority, moreover, is entirely permissive and discretionary and its exercise, therefore, is not subject to Tort Act review (28 U.S.C.A. 2680).

The customary procedures were followed in May, 1948. On May 26, General Walsh wrote to the chairman of District No. 1 (Ex. 331) directing attention to the high water and to the district responsibility in that connection:

> "Your attention is invited to the present high water in the Columbia River which will necessitate levee patrolling and maintenance by your Drainage District in order to prevent flood damage to the levees.
>
> "The Drainage District is responsible for the operation and maintenance of all the flood control works in compliance with Peninsula Drainage District Resolution dated September 25, 1939.
>
> "This office is pleased to note that the stop-log structure near Swift's plant is being made ready for immediate placing of logs."

The chairman replied (Ex. 332):

> "Referring to your letter of May 28th, calling our attention to necessary steps to be taken in order to prevent flood damage to the levees during the present high water in the Columbia River.
>
> "All industries located within the diked area, and the officials of the Housing Authority of Portland at Vanport are cooperating in the patrolling of the levees, sand bagging levee openings, and doing all possible to keep the seepage water pumped out of the district.
>
> "A committee of three has been set up with power to act during this emergency, and the work is being carried on under their supervision."

The Corps representatives, Mr. Doyle and Mr. Dibblee, received instructions "to go to Peninsula Drainage Districts Nos. 1 and 2 and contact the local interests, local supervisors there, in an advisory capacity in regard to the protective measures that were being performed in their flood fight, and to determine as best I could as to whether these procedures were correct and advise them as to their procedures and report conditions back to our District Engineer's office." (Tr. 940). They did as they were told. They checked the preparations for the flood fight (Tr. 899); they examined the embankments, particularly the areas at which seepage had developed (Tr. 499-511, 514-526); they provided technical advice as to the proper treatment of seepage, boils and blisters (Tr. 900-901, 942); and they shared the common conclusion that Vanport did not appear to be in danger (Tr. 903, 945). But this is all. No Corps representatives had or purported to have charge of the flood fight (Tr. 823). No Corps representative attended the planning meetings, the meetings of Wednesday and Friday at the Portland Union Stockyards (Pto. 69-70) and the Red Cross meeting of Saturday afternoon (Pto. 67). No Corps representative communicated with any appellant during the flood period. (Tr. 32, 42, 58, 74, 85, 104, 112, 123, 133, 139, 144, 152, 162, 168, 176, 185, 195, 209, 220, 232, 241, 249, 260, 267, 278, 286, 291, 307, 313, 340, 349, 355, 539).

Employees of the United States have only such duties as Congress imposes upon them. Since Congress had imposed no flood fighting duties on the

Corps, the Corps representatives had no duty or obligation to appellants. In the absence of that duty or obligation, negligence of the Corps representatives, even if it could be proved, would be immaterial.

3. The United States as owner of Vanport had no flood fighting duties to appellants.

Appellants lay great emphasis on the fact that the Vanport premises—the land, the buildings, and the apartment furnishings—belonged to the United States (Pto. 32). They insist this means that the relation between appellants and the Government was that of landlord and tenant and that out of that relationship there arose some sort of duty on the Government to protect appellants from flood damage. The premise is unsound and even if it were correct the conclusion would not follow.

On May 30, 1948 and for some years prior thereto the Vanport premises had been leased to the Housing Authority of Portland (Exs. 349-356). HAP was created on December 11, 1941 by resolution of the City Council of Portland acting under the Oregon State Housing Authorities Law (Pto. 34). In accordance with the statute, the Portland mayor appointed five commissioners (later increased to seven upon an amendment of the statute) to manage and direct the Authority (Pto. 34). All the HAP commissioners have been prominent Portland residents familiar with housing problems (Pto. 35). They are not Government officials nor in the employ of the United States (Pto. 47).

The lease (Ex. 351) from the United States to HAP is in every respect a conventional, formal instrument of lease. It conveys the premises (par. 1), describes the term (par. 2), provides for rent (par. 3), deals with operation of the property, budgets, accounts and deposits of funds (pars. 4, 5, 6, 7), obligates the lessee to maintain the premises (par. 8), provides for inventories and bonds (pars. 9, 10), forbids assignments (par. 11), provides for surrender of the premises at the end of the term (par. 12), obligates the lessor to make certain advances (par. 13), provides for peaceful possession and payments in lieu of taxes (pars. 14, 15), recognizes the title of the lessor (par. 17), protects officers of the lessee from personal liability (par. 18), provides for termination on total destruction of the premises (par. 19), provides for re-entry on default (par. 20) and for arbitration of controversies (pars. 21, 22). It includes the conventional provisions of government contracts relating to war powers, the personal interest of members of Congress and government employees (pars. 23, 24, 25), it makes provision for notices and automatic renewal (pars. 26, 27) and, finally, it preserves the civil and criminal jurisdiction of local law (par. 28).

The rent to be paid by HAP under the lease is the net profit, determined quarterly, from the operation of the projects subject to the lease (par. 2). The United States, in turn, covenants to protect HAP from any loss on the operation and to advance operating capital (par. 13). Since the financial risk of the

operation is thus on the United States, the lease requires a detailed budget of HAP operations to be approved in advance by FPHA (Ex. 351, par. 5; Ex. 361). Each year prior to the Vanport flood the lease projects operated at a profit and substantial sums were paid to the United States as rent (Pto. 43).

Appellants, like other Vanport tenants, occupied their apartments pursuant to a form of "revocable use permit" prepared by the HAP lawyer and approved by FPHA (Pto. 51). This permit named HAP as landlord (Ex. 395). It made no reference to the United States or to any Federal agency (Exs. 386, 395, 397). The tenants made their rental arrangements with, paid their rent to and conducted all negotiations in connection with the occupancy of their dwelling units with representatives of HAP (Pto. 52). Each of the Vanport tenants received on arrival a "Resident Handbook" (Ex. 393) stating that he held his apartment under lease (pp. 1-2), that the apartment and the furniture within it belonged to the United States (p. 3), that "the Housing Authority of Portland is your landlord" (p. 4), and that the lease signed by him "states your legal rights and responsibilities" (p. 5).

In Oregon "there are three essential elements of a lease, namely, description of the property, duration of term and rental consideration." *Young v. Neill,* 220 P. 2d 89, 91 (Ore. 1950); *Bevan v. Templeman,* 26 P. 2d 775, 778 (Ore. 1933). Each of the leases—the lease from the United States to HAP and the sub-

lease from HAP to appellants—fully satisfies these requirements. This means that HAP, not the United States, was the landlord of appellants. For this reason, if for no other, appellants cannot found their claims against the United States on the law of landlord and tenant.

A second reason why appellants can make nothing of the law of landlord and tenant lies in the fact that appellants are not complaining about the condition of the apartments in which they lived. Appellants argue as though the landlord-tenant relation were a status relation following the parties wherever they go. This is not true. The premises aside, landlord and tenant are in law strangers to each other. They have no general obligations one to the other. They are not fiduciaries. The landlord does not stand in *loco parentis* to the tenant. The law of landlord and tenant is the law of the premises. Only there does it create rights and duties.

The damage to appellants was not caused by any defect in the premises. The damage resulted from the failure of the western embankment. But the western embankment was not leased to appellants. A lease does not carry with it adjacent property of the lessor (*Killian v. Welfare Engineering Co.,* 66 N.E. 2d 305 (Ill. App. 1946); *Owsley v. Hamner,* 227 P. 2d 263, 267 (Cal. 1951); *Jackson v. Birgfeld,* 56 A. 2d 793, 795 (Md. 1948)) much less an embankment a quarter of a mile away in which the lessor has no interest whatever. As *tenants,* appellants must argue about their apart-

ments. Compare *Doyle v. Union Pacific Railway Co.,* 147 U.S. 413, 422 (1893). They make no such argument and therefore they assert no claim as *tenants.*

The cases, moreover, make it clear that a landlord has no flood fighting duties to his tenant. *Doyle v. Union Pacific Railway Co.,* 147 U.S. 413, 423 (1893) illustrates the rule. There plaintiff, by agreement with defendant, occupied a section house "built near the base of a high and steep mountain and in a place subject to snowslides and dangerous on that account." Defendant knew of the snowslide danger but plaintiff did not. A slide destroyed the section house, injuring the plaintiff and killing her children. The trial court, in effect, directed a verdict for defendant. Plaintiff contended this was error, since on the evidence the jury would have been entitled to find that defendant was negligent in failing to warn plaintiff of the snowslide danger. The Supreme Court affirmed the judgment for defendant, saying:

> "It is, however, well settled that the law does not imply any warranty on the part of the landlord that the house is reasonably fit for occupation; much less does it imply a warranty that no accident should befall the tenant from external forces, such as storms, tornadoes, earthquakes or snow-slides."

The rule of this case, that a landlord, *as landlord,* is not responsible to the tenant for storm damage, is the law of Oregon. The Court below considered the Oregon cases and so concluded:

> "15. Under the law of Oregon a landlord has no duty to protect his tenants against fire, floods or other public calamities."

The District Court opinion explains (109 F. Supp. 225):

> "No case has been cited or found in Oregon or elsewhere which holds the landlord for a break in a dike holding back the flood water of a natural stream, whether the embankment was a part of the demised premises or not.
>
> "The tenant has no obligation to lease a particular house in a particular location. If he is attracted by cheap rent, he might consider whether there are other drawbacks."

A tenant in Oregon, as elsewhere, takes the premises as he finds them and without warranty that they are habitable or fit for the purpose intended. Two Oregon decisions, *Stovall v. Newell,* 75 P. 2d 346 (Ore. 1938), and *Asheim v. Fahey,* 133 P. 2d 246 (Ore. 1943), illustrate the rule. In *Stovall* the tenant was injured when the handle of a water faucet suddenly broke in his hand. The landlord a few hours earlier had leased the premises to the tenant, assuring him that "Everything was okey." The Oregon Supreme Court reversed a judgment for the tenant and held that there was no showing of negligence on the part of the landlord, that a landlord does not insure the tenant's safety and that the affirmative representations as to the condition of the apartment were mere seller's talk not to be accepted as a warranty. In *Asheim* the

lease obligated the lessors to keep "the walls and ceilings and floors * * * in good order and repair and in safe condition during the term of this lease." Plaintiff, an employee of a subtenant, was injured when, without warning, the ceiling collapsed. He argued that defendants were negligent in failing to inspect the ceiling and that in any event they had covenanted to keep the premises safe. The trial court judgment for defendants was affirmed. The Oregon court held, among other things, that a landlord does not insure the safety of his tenant, that the covenant to keep the premises safe was only a covenant to repair and to use due care in that connection, and that there was no negligence in failing to discover the weakness in a ceiling which appeared to be sound and strong.

This decision demonstrates the distance by which appellants fail to prove a claim under the Oregon law of landlord and tenant. In *Asheim* the landlord had covenanted to keep the premises safe. Even so the tenant did not succeed, for the ceiling fell without warning or prior indication of weakness. The western embankment at Vanport fell without warning or prior indication of weakness. In Oregon, therefore, the United States would not be liable even if it had agreed with appellants to maintain the premises in a safe condition. There was, of course, no such covenant.[10]

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[10]The Oregon rule that a landlord does not warrant or insure the safety of his tenant is the accepted rule of the common law. " 'Since the tenant is bound to inspect beforehand, and is subject

There is nothing in the Oregon decisions cited by appellants which conflicts with or qualifies *Stovall* or *Asheim*. Appellants' first case, *Garrett v. Eugene Medical Center,* 224 P. 2d 563 (Ore. 1950) illustrates the familiar rule that a landlord who leases portions of a building to various tenants, retaining control of hallways and elevators, must use due care to keep the hallways and elevators in good condition. The second

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to the rule of caveat emptor, and the landlord owes no duty to repair, the latter is, in general, not liable for injuries to the tenant or his property resulting from the construction or condition of the demised premises.' " *Conradi v. Arnold,* 209 P.2d 491, 498-9 (Wash. 1949). " 'In the absence of warranty, deceit or fraud on the part of the landlord, the rule of caveat emptor applies to leases of real estate, the control of which passes to the tenant, and it is the duty of the tenant to make examination of the demised premises to determine their safety and adaptability to the purposes for which they are hired.' " *Jespersen v. Deseret News Pub. Co.,* 225 P.2d 1050, 1053 (Utah 1951). "The rule is well established that, as to structural defects, the tenant ordinarily takes the demised premises as he finds them, and a landlord is not liable for injuries caused thereby." *McLain v. Haley,* 207 P.2d 1013, 1015 (N.M. 1949). "In the ordinary lease of real estate there is no implied warranty that the premises are fit for occupancy or for the particular use contemplated by the lessee. The lessee takes the premises as he finds them." *Gade v. National Creamery Co.,* 87 N.E.2d 180, 182 (Mass. 1949). "Where the right of possession and enjoyment of the leased premises passes to the lessee, the cases are practically agreed that, in the absence of concealment or fraud by the landlord as to some defect in the premises, known to him and unknown to the tenant, the tenant takes the premises in whatever condition they may be in, thus assuming all risk of personal injury from defects therein." *Caudill v. Gibson Fuel Co.,* 38 S.E.2d 465, 469 (Va. 1946). "Where the landlord surrenders possession and control of the leased premises to the tenant, in the absence of fraud or concealment, the tenant assumes the risk as to the condition of the premises, including the heating, lighting apparatus, plumbing, water pipes, sewers, etc." *Brooks v. Peters,* 25 So.2d 205, 207 (Fla. 1946). "An implied covenant on the part of the landlord that the premises are suitable for the purposes for which they are rented, or that they are in any particular condition, does not arise from the mere renting of the premises." *Croskey v. Shawnee Realty Co.,* 225 S.W.2d 509, 514 (Mo. 1949).

case, *Senner v. Danewolf,* 6 P. 2d 240 (Ore. 1932) holds that a landlord who knows of a dangerous condition on the premises and who does not disclose it is responsible for any consequent damage. In the third case, *Staples v. Senders,* 101 P. 2d 232 (Ore. 1940), the court exonerated the owner of the property when the failure to put guard rails around a trap door was the fault of the lessee. The fourth case, *Longbotham v. Takeoka,* 239 Pac. 105 (Ore. 1925), supports the position for which appellee argues. There the tenant suffered rain damage because of the failure of the landlord to adequately drain the landlord's premises. The defendant was held liable, not as landlord, but because he had interfered with the natural drainage of surface water. Since this surface water drainage rule has no application to flood waters, the case is important only because the Oregon court recognized that the law of landlord and tenant was fundamentally irrelevant.

The obligations of a landlord to his tenant in Oregon, as in most jurisdictions, are well settled and well known. A landlord who knows of a hidden defect in the premises which the tenant is unlikely to discover must pass along this information. *Senner v. Danewolf,* 6 P. 2d 240 (Ore. 1932). The duty arises, however, only with respect to defects in the premises as to which the landlord has notice; and he has no duty to make an inspection. *Stovall v. Newell,* 75 P. 2d 346 (Ore. 1938); *Asheim v. Fahey,* 133 P. 2d 246 (Ore. 1943). If the landlord leases portions of a building to

various tenants and retains control of hallways and stairways he must use due care to see that the hallways are safe. *Garrett v. Eugene Medical Center,* 224 P. 2d 563 (Ore. 1950); *Pritchard v. Terrill,* 222 P. 2d 652 (Ore. 1950).[11] The third obligation of the landlord is to repair the premises if he has covenanted to do so. *Asheim v. Fahey,* 133 P. 2d 246 (Ore. 1943).

In each instance, however, the obligation of the landlord arises only after he has notice of the defect. *Stovall v. Newell,* 75 P. 2d 346 (Ore. 1938); *Asheim v. Fahey,* 133 P. 2d 246 (Ore. 1943). Appellants do not contend that the United States had actual notice of a defect in the western embankment. Indeed the whole burden of their argument is that the United States did not have adequate information in that connection. This argument in itself destroys any claim against the Government based on landlord and tenant theories.

Fundamentally, however, the law of landlord and tenant is irrelevant to these cases. For as the Supreme Court held in *Doyle v. Union Pacific Railway Co.,* 147 U.S. 413, 422 (1893), a landlord has no obligation to protect his tenant from storm or flood damage. He does not warrant that the premises are habitable or fit for the purpose intended. The tenant

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[11]Appellants' principal authority, *State of Maryland v. Manor Real Estate Co.,* 176 F.2d 414 (C.A. 4 1949) is a case in which there was a failure to discharge this duty. The court found that employees of the Government had failed, after notice, to exercise ordinary diligence in eliminating typhus carrying rats from the hallways and cellar of the building, that is, from those portions of the building remaining in the control of the landlord.

takes the premises as he finds them and with them the risk, whatever it may be, of fire, flood or other catastrophe.

The reason why appellants prefer to discuss these cases in terms of landlord and tenant is plain enough. Appellants are asking the Court to create an unprecedented liability: to obligate the United States to pay for flood damage. The implications of any such rule must give pause to anyone. Appellants attempt, therefore, to find narrower grounds for decision, reasons which will provide a judgment for them without compelling the United States to pay flood damage generally. But consider what the landlord-tenant argument really means. It means, to take the most obvious example, that every landlord behind the Mississippi levees has some obligation to his tenants with respect to those levees. Boldly stated, it means that he warrants that the premises are safe from levee failure; more cautiously stated, it means that in the exercise of his landlord duties, he must inspect the levees and find them satisfactory; or, at the very least, he must become informed of the condition of those levees and warn his tenants of any danger in that connection. Obviously, no property owner in the Mississippi Valley believes that he has any such obligation. Obviously, the law thus far recognizes no such obligation. But appellants' argument, if it means anything, goes even further. It means in the last analysis that every landlord has duties with respect to his tenant which extend beyond the premises, up and down the block, through-

out an area and in a manner totally undefined. This doctrine, if accepted, would revolutionize all accepted notions of landlord-tenant rights and obligations. If there is reason for caution in creating unprecedented liabilities for flood damage, there is at least equal reason to be hesitant about rewriting the law of landlord and tenant as appellants suggest.

4. The United States owed no duty to appellants on account of the "seizure" of the railroads.

With respect to the "seizure" of the railroads under Executive Order No. 9957, the Court below found:

> "9. On May 30, 1948, the properties of the Spokane, Portland and Seattle Railway Company and the Union Pacific Railroad Company were under technical 'seizure' by the United States in connection with a labor dispute resulting in an alleged national emergency. The 'seizure' of the properties of these railroads was a fiction of the flimsiest kind. That 'seizure' did not in fact affect in any way the ownership or control of the railroads or their properties, including the ownership or control of the western embankment at Vanport. No duty on the part of the United States to maintain the western embankment for flood protection purposes, or at all, arose out of this so-called 'seizure.' Moreover, no act or omission of any employee of the railroads has been proved which constituted negligence. The officers and employees of the railroads, whether under federal control or not, acted in the light of all available knowledge as to the construction of the fill, the materials used and the nature of the un-

derlying ground. As operators of railroads they acted with respect to the safety of their passengers and freight under a duty almost absolute. Yet trains passed over this fill at the regularly established intervals all during the flood period and up until half an hour before the break occurred. The United States did not build, maintain or operate the western embankment and had no responsibility therefor. Inspections of the embankment were made with meticulous care. Precautions were taken. All the indicia of disaster now pointed up by the event were appraised at the time by the railroads' representatives in the light of their duty to their own passengers and freight and of their knowledge of the nature of the fill. The event proved them wrong but not negligent."

This conclusion, that the "seizure" was "a fiction of the flimsiest kind" and that it did not, in fact, affect ownership or control of the western embankment is abundantly supported by the record. Whatever the situation may have been with respect to other railroads and other railroad employees, this record demonstrates that in Portland the so-called seizure was only a formality and a thin one at that.

The circumstances are these:

On January 16, 1948, three railroad brotherhoods issued a strike call for February 1 to enforce wage demands (Pto. 75). Efforts to settle the dispute were unsuccessful (Pto. 75) and on April 20 the unions gave notice their members would strike May 11 (Pto. 75). On May 10 the President issued Executive

Order No. 9957 providing for operation by the Secretary of the Army of the properties of the important railway carriers, including the Union Pacific and the S. P. & S. (Pto. 75).

Army representatives were sent to the operating headquarters of each of the railroads named in the order (Pto. 76). On or about May 10 a captain and two assistants came to the Portland office of the S. P. & S. (Pto. 76) and at about the same time three Army representatives arrived at the Portland office of the Union Pacific (Pto. 77). The Army officers did not participate in any way in the management of the railroad companies (Pto. 76-77). They did no more than to file daily reports calling attention to anything unusual in the operations of the preceding day and otherwise simply noting that operations were normal (Pto. 77). The Army representatives did not participate in the 1948 flood fight or in anything which the railroad companies did or did not do in that connection (Pto. 77).

The Executive Order did not require the railroad companies to alter, nor did the railroad companies in fact alter their normal relations with their employees (Pto. 77). The duties, responsibilities, methods and sources of pay, and methods and sources of supervision of the railroad employees were entirely unaffected by the Order (Pto. 78). The railroad company employees did not take an oath of loyalty to the United States; they did not acquire civil service status; they did not participate in the Federal Employees Retirement Plan; they did not receive the

customary rates of pay for government employees; they were not paid from funds belonging to the United States (Pto. 78). During the seizure period the Army issued four general orders to the carriers (Pto. 78), one of which provided that the carriers would remain subject to suit (Pto. 79).

Negotiations between the carriers and the unions continued during May and June, 1948, and on July 8, 1948 the wage dispute was settled (Pto. 79). The railroads then entered into agreements with the United States whereby, among other things, the United States waived any right it might have to an accounting from the carriers and the carriers in turn undertook certain obligations to indemnify the Government (Pto. 79).[12]

Under these circumstances, it seems clear that the Union Pacific and the S. P. & S. did not become federal agencies or their employees federal employees within the meaning of the Tort Act. The seizure had

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[12]Referring to the period of Government seizure the indemnity agreement signed by the Union Pacific and the S.P. & S. provided:

> "* * * the carrier agrees to indemnify and hold the United States, its officers, agents and employees harmless against any liability arising out of or in connection with said possession, control or operation, and agrees to defend at its own cost and expense any such parties in any action or claim arising out of or in connection with such possession, control or operation."

When the complaints below were amended to refer to and rely upon the so-called seizure of the railroads, the Government moved for leave to file and serve a third party complaint calling attention to the indemnity obligations of the roads and praying that if and to the extent the plaintiffs had judgment against the United States, the United States should have judgment over against the railroad companies. The Court denied the motion. In the opinion of the Government, the motion was well taken and should have been granted. See Rule 14 of the Federal Rules of Civil Procedure.

a specific and limited purpose: to keep the roads in operation pending settlement of the labor controversy. The Executive Order specifically provides that the carriers are "to continue their respective managerial functions to the maximum degree possible consistent with the purposes of this order" 13 F.R. 2503. As far as these particular roads were concerned, there was, as a practical matter, no seizure at all.

Certainly there is nothing in the Tort Act or in its legislative history to suggest that Congress intended to assume liability for the negligence of employees of companies temporarily "seized" to prevent prejudice to the national interest. This seems particularly true where, as here, the companies during the seizure remained subject to suit for negligence of their employees (Pto. 79). General Order No. 4 was careful to provide that "Until further order carriers will remain subject to suit as heretofore * * *." (Ex. 415). The purpose of the Tort Act was to waive sovereign immunity and to permit a recovery where prior to the Act no recovery was possible. The railroads, neither before nor after the Government seizure, had the benefit of the sovereign immunity doctrine; and accordingly, there is no reason to suppose that the statute was intended to apply in such cases.

Another reason why the seizure of the roads imposed no duty on the United States lies in the fact that the railroad companies themselves, and hence the United States to the extent it became their successor, had no duty to appellants. The railroad fills which

constituted the western embankment were completed by 1918 (Pto. 16-19). Appellants arrived at Vanport more than twenty years later. The Oregon Supreme Court has recently held that one who acquires property in the light of an existing use of neighboring property takes the situation as he finds it. In *East St. Johns Shingle Co. v. City of Portland,* 246 P.2d 554, 566 (Ore. 1952), the court said, "The uncontradicted facts disclose that the plaintiffs, by reason of their own knowledge of the conditions of which they complain, purchased their properties cum onere." The railroad fills were built for railroad purposes. Appellants, by taking up residence behind those fills, could not create any obligation on the railroads to maintain the fills as flood control structures.

Indeed, if the western embankment had been built in the first instance not for railroad but for flood control purposes, the railroad companies would, nevertheless, have no obligation to maintain that embankment carefully or at all for the benefit of appellants. The Court below considered the cases and concluded:

> "14. Under the law of Oregon a person who erects a dike or embankment for flood protection or other purposes has no duty under the circumstances of these cases to maintain that dike or embankment carefully or at all for the benefit of those who own or occupy property in a location which it appears to protect."

The suggestion that one who builds an embankment for flood protection purposes thereby acquires an

obligation to maintain that embankment for the benefit of his neighbors has not often been made, but on each such occasion it has been rejected. "The fact that a landowner avails himself of the right to repel vagrant waters of a river by embankments does not, in the absence of some further circumstances or set of circumstances, impose upon him any obligation to maintain such obstruction, or to refrain from restoring natural conditions." *Weinberg Co. v. Bixby,* 196 P. 25 (Cal. 1921). "But it is inconsistent with any sense of fairness or logic to assume that a landowner must by the maintenance of an artificial embankment protect his neighbor below from waters of any character which otherwise would flow upon the lower proprietor's estate." *Vollrath v. Wabash R. Co.,* 65 F. Supp. 766, 772 (D.C. Mo., 1946). "The only basis upon which plaintiff could rightfully claim injury for this action would be on the theory that the spillway, having once been set at a higher elevation and with a narrower outlet, gave plaintiff a vested right in having it maintained in that original condition. We believe this position is untenable." *Ireland v. Henrylyn Irr. Dist.,* 160 P.2d 364, 365 (Colo. 1945). See also *Whitcher v. State,* 181 A. 549, 552 (N.H. 1935); *Branch v. City of Altus,* 159 P.2d 1021 (Okla. 1945); *Savoie v. Town of Bourbonnais,* 90 N.E.2d 645 (Ill. App. 1950).

This rule is the inevitable consequence of the accepted doctrine that flood waters are a common enemy against which each landowner is entitled to protect

himself as he sees fit and without any obligation to adjoining landowners. For cases recognizing this common enemy rule see *Mogle v. Moore,* 104 P.2d 785 (Cal. 1940); *Rex v. Commissioners,* 8 B. & C. 356, 108 Eng. Repr. 1075 (1828); *Cubbins v. Mississippi River Comm'n.,* 241 U.S. 351, 363 (1916); *Southern Pac. Co. v. Proebstel,* 150 P.2d 81 (Ariz. 1944); *Kraus v. Strong,* 227 P.2d 93 (Kans. 1951); *Sinclair Prairie Oil Co. v. Fleming,* 225 P.2d 348 (Okla. 1949); *Bass v. Taylor,* 90 S.W.2d 811 (Tex. 1936); *Leader v. Matthews,* 95 S.W.2d 1138 (Ark. 1936); *Smeltzer v. Borough of Ford City,* 92 A. 702 (Penn. 1914); *Honey v. Bertig Co.,* 150 S.W.2d 214 (Ark. 1941); and in Oregon, *Street v. Ringsmyer,* 216 Pac. 1017 (Ore. 1923); *Morton v. Oregon Short Line Ry. Co.,* 87 Pac. 151 (Ore. 1906); *Price v. Oregon R. Co.,* 83 Pac. 843 (Ore. 1906).

The Court below was correct in concluding that the so-called seizure did not, in fact, make these particular companies agencies of the United States nor the employees of those companies Government employees. The Court below was correct in concluding that even if the United States became the successor to the railroad companies, the United States, nevertheless, had no duty to appellants, since the railroads themselves had no such duty. The Court below was correct in concluding that the railroad employees were not in any respect guilty of negligence or wrongful conduct, even assuming that a duty to appellants existed. Indeed, it seems not unlikely that appellants

themselves agree with these conclusions; otherwise, suits would undoubtedly have been filed against the railroad companies as well as against the United States.

On May 30, 1948, the United States had, so to speak, three relationships with the flood situation. The United States was the owner of Vanport; the employees of the Corps of Engineers were providing technical advice and assistance to those responsible for the conduct of the flood fight; there had been a so-called seizure of the S. P. & S. and the Union Pacific railroads. The Court below decided that no one of these relationships or all of them together imposed any duty on the United States in favor of these appellants. For reasons which this brief has explained, that decision is correct. Under these circumstances, even if negligence had been proved and even if the other defenses of the United States to these claims were unavailable, there could here be no recovery.

5. The United States assumed no duty to appellants.

Appellants argue here as they argued below that even if the United States had no duty to them, the representatives of the Corps and of HAP assumed such a duty and failed to discharge it. The District Court rejected this suggestion. As to the Corps of Engineers the Court found:

> "The Corps of Engineers and its representatives neither had nor assumed any obligation to be responsible for the safety of the Vanport resi-

dents or their property and no duty was imposed upon the United States by the activities of the Corps." (Finding 8).

A similar finding was made with respect to the Housing Authority and its employees:

"13. The agents and employees of the United States and of the Housing Authority assumed no duty in connection with the flood situation which they failed to discharge. The bulletin distributed to the residents of Vanport on Sunday morning, May 30, 1948, did not guarantee that Vanport would not be flooded. On the contrary, the bulletin, by describing plans for the evacuation of Vanport, made it clear that a flood was a possibility. It was emphatic in saying that if a flood came there would be no opportunity to remove property situated in Vanport unless one happened to be on the spot at the time and then that only a few valuable possessions and a change of clothing could be saved. There was no holding out or assumption of duty to give the Vanport tenants ample time to evacuate their property. No negligence has been proved in connection with the bulletin or the statements made in it."

These findings are abundantly supported by the record. Since, on their own testimony, no one of the appellants communicated with the representatives of the Corps (Tr. 28-378) obviously the Corps representatives made no promise to them. The bulletin, as the Court below pointed out, promised no more than that in the event an evacuation became necessary an

alarm would be given. It is stipulated that the alarm was given (Pto. 71). What, then, were the commitments to appellants which were not discharged?

Appellants, by arguing for a duty assumed and not discharged, are seeking, of course, to bring themselves within the so-called Good Samaritan rule. The cases make it clear, however, that even if there had been an assumption of duty and a failure to discharge it Good Samaritan principles would not be applicable here. The typical Good Samaritan case is a case in which the employees of defendant, almost always a carrier, take charge of a plaintiff helpless through illness, accident or drunkenness and then fail to use ordinary care in looking after him. See *Layne v. Chicago & A. R. Co.,* 157 S.W. 850 (Mo. App. 1913); *Middleton v. Whitridge,* 108 N.E. 192 (N.Y. 1915); *Kuhlen v. Boston & N. St. Ry. Co.,* 79 N.E. 815 (Mass. 1907). Appellants do not qualify for Good Samaritan protection for at least two reasons. They were not helpless (see *People v. Beardsley,* 113 N.W. 1128 (Mich. 1907); *Osterlind v. Hill,* 160 N.E. 301 (Mass. 1928)) and they were not in the care or custody of the United States. In May, 1948 appellants were adults, in good health, fully capable of looking after their own affairs. They were free to come and go as they saw fit; to take advice from whatever source they found satisfactory; and in general to assume the burden imposed by the law on everyone of using "ordinary care for his own protection." *Carroll v. Grande Ronde Electric Co.,* 84 Pac. 389, 394 (Ore. 1906).

The Good Samaritan doctrine has no application in cases involving public officials. The state and its agencies regularly come to the aid of persons in peril. Frequently that aid is not fully effective. No court has ever held, however, that Good Samaritan considerations are relevant or that a government which attempts more than it achieves is liable for its failures. On the contrary if, for example, a city undertakes to provide fire and police protection, it is not responsible for failure to make that protection adequate even though that failure is alleged to be negligent. *Steitz v. City of Beacon,* 64 N.E.2d 704 (N.Y. 1945); *Stang v. City of Mill Valley,* 240 P.2d 980 (Cal. 1952); *City of Columbus v. McIlwain,* 38 So.2d 921 (Miss. 1949); *Rhodes v. Kansas City,* 208 P.2d 275 (Kans. 1949); 173 A.L.R. 348. Nor is there room under the Tort Act for Good Samaritan relief. Good Samaritan liability, by definition, is predicated upon volunteer activity. Under the Tort Act, however, the liability of the Government is limited to negligence within the scope of federal employment. This eliminates consideration of claims based upon a volunteer effort. *Sanchez v. United States,* 177 F.2d 452 (C.A. 10, 1949). Moreover, as the Court below pointed out, the extent to which, if at all, the Good Samaritan theory "is accepted by decisions of the Oregon courts" is doubtful (109 F. Supp. 225). Certainly appellants can point to no Oregon case in which Good Samaritan principles have been applied in circumstances even remotely resembling those before the Court. Finally, it is settled, of course, that the Good Samaritan, even

when the rule applies, is not an insurer. The obligation is discharged if he does the best he knows how or if he leaves the plaintiff in no worse condition than he found him. *Owl Drug Co. v. Crandall,* 80 P.2d 952 (Ariz. 1938); *Pennsylvania R. Co. v. Yingling,* 129 Atl. 36 (Md. 1925). The no-negligence findings of the Court below are, therefore, a complete answer to appellants' Good Samaritan argument just as they are a complete answer to these claims in every other aspect.

D. THE UNITED STATES CANNOT BE HELD LIABLE FOR THE NEGLIGENCE OF HOUSING AUTHORITY EMPLOYEES.

Appellants argue that the employees of the Housing Authority were negligent and that the United States is responsible for the resulting damage (Br. p. 16). There was in fact no negligence on the part of HAP and its employees. The District Court so found (Finding No. 11) and the record thoroughly supports this due care conclusion. Throughout the flood period the HAP representatives showed great diligence and good sense. They collected men, equipment and materials for the flood fight (Tr. 567-9); they established an elaborate patrol system along the embankments (Tr. 571-4); they took advice on technical matters from representatives of the Corps of Engineers, persons competent to advise them (Tr. 677-8, 736-40); they were prepared to give an alarm if the occasion arose (Tr. 570-1); and at the suggestion of the representatives of the Governor, the sheriff, the County Commis-

sioners and Red Cross, they distributed the bulletin to the Vanport residents (Pto. 67). There is here no negligence.

But even if the HAP representatives were in some respect negligent, appellants could not, on that account, maintain an action against the United States. To prove a case under the Tort Act, a plaintiff must demonstrate a negligent or wrongful act or omission "of any employee of the Government while acting within the scope of his office or employment * * *" 28 U.S.C.A. 1346(b). Within the meaning of this section "'Employee of the government' includes officers or employees of any federal agency * * *" 28 U.S.C.A. 2671. "'Federal agency' includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States." 28 U.S.C.A. 2671. The Court below concluded that the Housing Authority was, in effect, project manager for the United States at Vanport, and in that sense a federal agency. This is not necessarily a determination that the United States would be responsible for the torts of HAP employees. The fact is that no such responsibility exists.

The Housing Authority, created by the Portland City Council acting under the Oregon State Housing Authorities Law (Pto. 34), is a quasi-municipal corporation and an agency of Oregon. See *Wickman v. Housing Authority of Portland,* 247 P.2d 630 (Ore.

1952).[13] Since it was first created, HAP has owned and operated a 400-dwelling unit, low-rent project located in Portland known as Columbia Villa (Pto. 36). It has also leased from the United States some fifteen war housing projects (Pto. 39) including Vanport. HAP's interest in Vanport depends entirely upon a formal agreement of lease (Ex. 351) by the terms of which the financial risk of the operation is on the United States (Ex. 351). This financial arrangement does not mean that agreement is any less a lease. Compare *Ault Wooden-Ware Co. v. Baker,* 58 N.E. 265 (Ind. App. 1900); *Van Avery v. Platte Valley Land & Inv. Co.,* 275 N.W. 288 (Neb. 1937); *In re Owl Drug Co.,* 12 F. Supp. 439 (D.C. Nev. 1935); 170 A.L.R. 1113. In Oregon, "there are three essential elements of a lease, namely, description of the property, duration of term, and rental consideration." *Young v. Neill,* 220 P.2d 89, 91 (Ore. 1950); *Bevan v. Templeman,* 26 P.2d 775, 778 (Ore. 1933). The HAP lease meets and more than meets these requirements.

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[13]For other decisions to the same effect see *Brammer v. Housing Authority of Birmingham District,* 195 So. 256 (Ala. 1940); *Denard v. Housing Authority of Ft. Smith,* 159 S.W. 2d 764 (Ark. 1942); *Kleiber v. City and County of San Francisco,* 117 P. 2d 657 (Cal. 1941); *People v. Newton,* 101 P. 2d 21 (Colo. 1940); *Edwards v. Housing Authority of City of Muncie,* 19 N.E. 2d 741 (Ind. 1939); *Spahn v. Stewart,* 103 S.W. 2d 651 (Ky. 1937); *State ex rel. Porterie v. Housing Authority of New Orleans,* 182 So. 725 (La. 1938); *Laret Inv. Co. v. Dickmann,* 134 S.W. 2d 65 (Mo. 1939); *State ex rel. Great Falls Housing Authority v. City of Great Falls,* 100 P. 2d 915 (Mont. 1940); *Lennox v. Housing Authority of City of Omaha,* 290 N.W. 451 (Neb. 1940); and *Wells v. Housing Authority of City of Wilmington,* 197 S.E. 693 (N.C. 1938).

The argument that HAP is a federal agency and not, as it appears to be, an agency of Oregon leasing property from the United States, depends to a large extent on certain releases issuing from the Federal Public Housing Authority in Washington and addressed to such local housing authorities as HAP. These releases are part of a so-called Manual of Policy and Procedure created by FPHA early in 1942 (Pto. 44). The Manual is designed (a) to express FPHA policy and requirements on subjects which, under the lease agreements, are for FPHA decision or approval; (b) to express the views of FPHA on subjects which are for decision by the local housing authorities but which involve the fundamental policy of the housing program; and (c) to provide information which may be of use to the local authorities (Pto. 44). The Manual is prepared in loose-leaf fashion (Pto. 44). From time to time FPHA distributes new mimeographed releases to be inserted in the Manual (Pto. 44). These releases are general in terms in the sense that they are not directed to any particular person or any particular housing authority (Pto. 45). The subjects covered by the releases are as follows: (a) budget and expense, including accounting; (b) care of and accountability for government property, including property in a terminated or stand-by status and including the disposition of such property; (c) selection of tenants and rental arrangements; (d) rental rates; (e) community services; (f) commercial operations on the projects; and (g) reports (Pto. 45). The

Manual relates to all housing operations in which FPHA has an interest, including both low rent and war housing (Pto. 45). As of any given date, therefore, all the releases in the Manual are not applicable to any particular project (Pto. 45). On May 30, 1948, there were approximately 125 releases in the Manual relating to projects such as Vanport (Pto. 45).

Appellants' assertions notwithstanding, these releases do not demonstrate that the United States controlled the HAP operation. On the contrary, the releases, in every instance, are responsive to and consistent with the lessor-lessee arrangement. During the war FPHA, with scores of such leases throughout the country, naturally wished to standardize accounting, reports and procedures. This, and only this, the releases accomplished. They did not interfere with local management and they did not modify the basic lessor-lessee arrangement.[14] Moreover it is Congress and not the author of an FPHA release who decides what is and what is not a federal agency. And Con-

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[14]A number of the releases are in the record. Some of them (Exs. 105, 117) are dated after May 30, 1948; others (Exs. 93, 97, 108, 109) were rescinded or replaced prior to May 30; and others (Exs. 98, 99) relate only to construction operations. Two of the releases (Exs. 94, 101) have to do with the Hatch Act which by its terms applies to state employees working on projects financed in part by the United States. One (Ex. 95) relates to in-grade promotion of FPHA employees and, as the numbering system indicates, has no applicability at Vanport. One (Ex. 96) relates to personnel policies but, as the exhibit itself makes clear, all the significant decisions, such as salary rates, vacation periods, etc., are left for local authority determination. One (Ex. 102) relates to the lease requirement that the local authorities carry public liability insurance. One (Ex. 104) relates to the prevailing wage requirements of the United States Housing Act of 1937. One (Ex. 106) encourages local authorities to provide community services to

gress has made it plain that local housing authorities such as HAP are not part of the Federal Government.

In 1937 Congress declared its purpose with respect to low-rent housing to be "to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions * * * that are injurious to the health, safety, and morals of the citizens of the Nation." (42 U.S.C.A. 1401). To this end Congress provided for loans (42 U.S.C.A. 1409), annual contributions (42 U.S.C.A. 1410) and capital grants (42 U.S.C.A. 1411) "to public housing agencies", that is, to

> "(11) The term 'public housing agency' means any State, county, municipality, or other governmental entity or public body (excluding the Administration), which is authorized to engage in

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their tenants without undertaking to specify what those services should be.

Since the United States had the ultimate financial risk with respect to the operation of the properties, a number of the releases have to do with financial matters: Accounting problems (Ex. 107), uncollectible accounts (Ex. 114), damage claims (Ex. 103), budgets (Exs. 120, 121) and rents (Exs. 125, 126). The property at Vanport belonged to the United States and HAP as lessee was responsible for it. Accordingly, releases were issued having to do with inspection systems and fire hazard (Exs. 110, 111, 112), records and inventories (Exs. 131, 132, 139), surveys in event of fire (Ex. 133), thefts and bonding of employees (Exs. 135, 136), maintenance problems (Exs. 106, 137, 138) and the disposition of surplus properties (Exs. 127, 128, 129, 130).

Since it was agreed that during the war the tenants should be persons employed in war industries releases were issued relating to tenant eligibility (Exs. 118, 123). Of the remaining exhibits one (Ex. 116) relates to moving expenses of tenants in projects on a terminated status, one (Ex. 119) relates to projects other than war housing projects, one (Ex. 122) relates to the use of the premises for public health purposes and one (Ex. 134) is an index.

> the development or administration of low-rent housing or slum clearance. The Administration shall enter into contracts for financial assistance with a State or State agency where such State or State agency makes application for such assistance for an eligible project which, under the applicable laws of the State, is to be developed and administered by such State or State agency." (42 U.S.C.A. Supp. 1402(11)).

This, obviously, is not a reference to an agency of the Federal Government. It is a reference to an independent organization with whom the United States is authorized to make all manner of contracts (42 U.S.C.A. 1409-15), to whom it may make loans (42 U.S.C.A. 1409) and arrange sales (42 U.S.C.A. 1412) and whose obligations (42 U.S.C.A. Supp. 1421(a)) are to be sharply distinguished from the obligations of the Government (42 U.S.C.A. 1420).

The war brought in its wake a host of housing problems. Congress provided for consultation by Federal representatives with "local public officials and local housing authorities" (42 U.S.C.A. 1545) on questions relating to war housing and authorized FPHA "to rent, lease, exchange, sell for cash or credit, and convey the whole or any part" of a war housing project (42 U.S.C.A. 1544) as it saw fit. Under the circumstances nothing was more natural than for FPHA to lease part of its war housing to local agencies such as HAP. This did not mean that the local authorities were *ipso facto* transformed into federal agencies.

Peace brought an end to the war aspect of the housing program but Congress recognized that in the hands of the local authorities war housing might serve a useful post-war purpose. To this end Congress provided for a conveyance of the Government's interest in certain named war housing projects to "the following local public housing agencies." (42 U.S.C.A. Supp. 1586). In the list is Portland Project No. 35021, known as Dekum Court (Ex. 351), and the authorized conveyance is to "Housing Authority of Portland." (42 U.S.C.A. Supp. 1586). This is, of course, express recognition by Congress that HAP is a "local public housing agency" and not part of the Federal Government.

The legislative history of the Federal housing legislation is all to the same effect. In introducing Senate Bill 1685, which eventually became the Housing Act of 1937, Senator Wagner said (38 Cong. Rec. 1889):

> "All the direction, planning and management in connection with publicly assisted housing projects are to be vested in local authorities, springing from the initiative of the people in the communities concerned. The Federal Government will merely extend its financial aid through the medium of these agencies."

The House Committee on Banking and Currency in its report on S. 1685 said (H. Rep. 1545, 75th Cong., 1st Sess.):

> "General Statement
>
> The bill provides assistance to the States and their political subdivisions in the remedying of

unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families whose income is so low that they cannot afford adequate privately owned dwellings. * * *

Decentralization

In contrast to present housing activities of the Federal Government, the bill contemplates a complete decentralization of the housing program, including the sale or leasing to public agencies of presently owned Federal housing projects. The bill does not authorize the direct Federal construction of any additional housing projects, but provides for a non-Federal program consisting of financial assistance to the states and their political subdivisions in the development and operation of local slum-clearance and low-rent housing projects."

In 1949 Congress carefully reviewed the housing program in connection with the Housing Act of that year. The Senate Committee on Banking and Currency again emphasized that local authorities such as HAP were strictly local organizations and said (S. Rep. 284, 81st Cong., 1st Sess.):

"The public-housing program is administered in the localities by local housing authorities which develop, own, and operate the low-rent projects. These local authorities were created pursuant to State law, and their members are usually appointed by the mayors of the respective localities. Although these local housing authorities have in almost every case enjoyed close and satisfactory relationships with the governing bodies of their

> localities, your committee has nonetheless believed it advisable to insert in the pending bill provisions which will assure that the operations of the local authorities have the general approval and support of their respective local governments.
>
> "The prime responsibility for the provision of low-rent housing is thus in the hands of the various localities. The role of the Federal Government is restricted to the provision of financial assistance to the local authorities, the furnishing of technical aid and advice, and assuring compliance with statutory requirements." (p. 16).

The House Committee on Banking and Currency expressed similar views. (See H.R. No. 590, 81st Cong., 1st Sess., p. 18).

This material, in the Government's judgment, leaves no room for argument. Congress has been very careful to make it clear that local agencies such as HAP must be recognized for what they are, that is, agencies of the several states and not agencies of the Federal Government. This is tantamount to saying that local housing authorities are not federal agencies within the meaning of the Tort Act. The Congressional determination on that point is clear and it is conclusive.

There is in fact no contrary suggestion in the books. Most of the states have housing laws roughly comparable to the Oregon legislation under which HAP was organized. In considering the constitutionality of such legislation careful attention has been given to the position and purpose of the local authorities. Nowhere has there been a suggestion that the author-

ities are part of the Federal Government. See *The Housing Authority v. Dockweiler,* 94 P. 2d 794 (Cal. 1939); *New York City Housing Authority v. Muller,* 1 N.E. 2d 153 (N.Y. 1936); *Opinion of the Justices,* 48 So. 2d 757 (Ala. 1950); *Nashville Housing Authority v. City of Nashville,* 237 S.W. 2d 946 (Tenn. 1951); *Opinion to the Governor,* 63 A. 2d 724 (R.I. 1949); *Dornan v. Philadelphia Housing Authority,* 200 A. 834 (Pa. 1938); *Belovsky v. Redevelopment Authority,* 54 A. 2d 277 (Pa. 1947); *Ryan v. Housing Authority of City of Newark,* 15 A. 2d 647 (N.J. 1940); *City of Phoenix v. Superior Court,* 175 P. 2d 811 (Ariz. 1946); 175 A.L.R. 1069. The courts have also been called upon to decide whether the local authorities are subject to suit. Again there has been no suggestion that they are federal agencies. See *Wickham v. Housing Authority of Portland,* 247 P. 2d 630 (Ore. 1952); *Ryan v. Boston Housing Authority,* 77 N.E. 2d 399 (Mass. 1948); *Housing Authority of Birmingham District v. Morris,* 14 So. 2d 527 (Ala. 1943); *Muses v. Housing Authority,* 189 P. 2d 305 (Cal. App. 1948).

There is nothing in the record or in the precedents to support an argument that HAP is a federal agency. What single characteristic does it have in common with an ordinary federal agency? It was created not by Congress but by the mayor of Portland; it exists not because of a federal statute but because of an act of the Oregon legislature; it is operated not by officers of the United States appointed by the President but by commissioners serving at the request of the Port-

land mayor; it borrows money from and enters into elaborate contracts with the United States, a procedure hardly sensible if HAP were part of the Federal Government. HAP is not a federal agency. The relation of HAP to the United States is strictly that of a lessee to its lessor, a contractual arrangement. The Tort Act provides expressly that "any contractor with the United States" is not to be considered a "federal agency". 28 U.S.C.A. 2671.

Just as HAP is demonstrably a local rather than a federal agency, so the employees of HAP are demonstrably employees of that organization alone and not employees of the United States. As of May 30, 1948, HAP had approximately 675 employees (Pto. 48) all reporting directly or indirectly to the executive director who, in turn, reports to the commissioners appointed by the Portland mayor (Pto. 47). Terms and conditions of employment for HAP personnel are fixed not by Congress but by HAP (Pto. 48). This includes salaries, vacation periods, working hours, rates of pay, etc. (Pto. 48). The application form provided to prospective HAP employees makes no mention of the United States (Pto. 49, Ex. 390). HAP employees receive their pay not from the Treasury but from funds obtained by HAP from rental payments (Pto. 49). This was the source of their pay in May, 1948 (Pto. 49). The HAP checks to its employees are not Treasury checks and they do not refer to the United States (Pto. 49; Ex. 391). HAP employees take no oath of loyalty to the United States; they have no civil service status; they do not

participate in the Federal Employees Retirement Plan; their rates of pay are not affected by general pay increases authorized by Congress for federal employees (Pto. 49). On the contrary they receive the benefits of the Oregon workmen's compensation scheme and approximately two-thirds of them, those engaged in maintenance work, are trade union members (Pto. 49). HAP under its union contracts obtains the help it requires by making demands upon the union (Pto. 49; Exs. 400-404), a method of employment hardly compatible with the civil service system. All employees of HAP receive their instructions from representatives of that organization and not from representatives of the United States (Pto. 47).

There is nothing here to support an argument that HAP employees are Government employees and the decisions in comparable situations are all to the contrary. In *Powell v. U. S. Cartridge Co.,* 339 U.S. 497, 507 (1950) munitions were made for the Government, under close Government supervision, from Government materials in a plant built and owned by the Government. The plant was operated by the Cartridge Co. on a cost-plus-a-fixed-fee basis with the result that the plant employees were paid with Government money. Nevertheless, the Court held that those employees were not federal employees:

> "In these great projects built for and owned by the Government, it was almost inevitable that the new equipment and materials would be supplied largely by the Government and that the products would be owned and used by the Gov-

ernment. It was essential that the Government supervise closely the expenditures made and the specifications and standards established by it. These incidents of the program did not, however, prevent the placing of managerial responsibility upon independent contractors.

"The relationship of employee and employer between the worker and the contractor appears not only in the express terminology that has been quoted. It appears in the substantial obligation of the respondent-contractors to train their working forces, make job assignments, fix salaries, meet payrolls, comply with state workmen's compensation laws and Social Security requirements and 'to do all things necessary or convenient in and about the operating and closing down of the Plant, * * *'

* * * * *

"The petitioner-employees and the Government expressly disavow, in their briefs, any employment relationship between them. The managerial duties imposed upon the respondents were the duties of employers. That such duties be performed by private contractors was a vital part of the Government's general production policy. In the light of these considerations, we conclude that the respective respondents, in form and in substance, were the employers of these petitioners within the meaning of the Fair Labor Standards Act."

If employees in a Government plant, paid with Government funds and producing Government munitions under close Government supervision are not United

States employees, how can it be argued that the HAP employees working for an organization organized under state law, paid with private moneys, hired and fired by HAP officials, and subject in their daily activities to no Government supervision are federal employees?

Powell was a decision under the Fair Labor Standards Act. Comparable decisions have been reached under the Tort Act. In *Fries v. United States,* 170 F. 2d 726 (C.A. 6, 1948) the United States Public Health Service provided funds and equipment to a county board of health to conduct, in cooperation with the Health Service, a veneral disease survey in an area where troops were quartered. The Government money was to be used, among other things, to hire chauffeurs, one of whom negligently injured the plaintiff. It was held that the United States was not responsible for the reason that the chauffeur was not a "federal employee". In *Lavitt v. United States,* 177 F. 2d 627, 629 (C.A. 2, 1949) plaintiffs owned a warehouse and certain potatoes stored in it. They applied to the United States for a loan under the farm price support program. Under the statute local farmer committees selected inspectors to review loan applications. When plaintiffs' application was received, the local committee appointed inspectors who, in the course of their work, negligently set fire to the warehouse. It was held that the United States was not responsible. The court ruled that the local committee was not a federal agency

> "We think it clear that the Tolland County Agricultural Association is not a federal agency in any way resembling an executive department or independent establishment of the United States and it certainly is not a corporation. Its employees or officers were not and could not be selected by the United States or the Department of Agriculture, or discharged by either." (pp. 629-30)

and that the inspectors were not "persons acting on behalf of a Federal agency":

> "The plaintiffs, however, assert liability on the ground that the inspectors were 'persons acting on behalf of a Federal agency in an official capacity,' and, therefore, governmental employees as defined in 28 U.S.C.A. § 941(b), above quoted. Perhaps they were to some extent acting on behalf of a federal agency as well as the borrowers, but to impose a liability based upon a putative agency over which the principal had no more control than in the present case would stretch governmental responsibility too far and might include all sorts of situations in which the United States required a conditional certification or approval before making a loan. It seems clear to us that the Government had no relation with inspectors chosen by the County Agricultural Association that would impose a liability to suit because of negligent acts on their part. A waiver of governmental immunity must be clear and in our opinion has not been shown in the present case." (p. 630)

There is nothing in the record before the Court, there is nothing in the books to support a conclusion that

HAP is a federal agency or that its employees are federal employees.

Liability under the Tort Act depends upon the rule of *respondeat superior*. *United States v. Campbell,* 172 F. 2d 500, 503 (C.C.A. 5 1949); *United States v. Eleazer,* 177 F. 2d 914, 918 (C.C.A. 4 1949); *United States v. Sharpe,* 189 F. 2d 239 (C.C.A. 4 1951). Under that rule the principal is held responsible for the torts of a servant because he selects the servant and controls his activity. The United States did not select the employees of HAP and did not participate in any way in their day to day activities. Certainly the United States did not direct or control what the HAP employees did or did not do in connection with the flood fight. HAP is not a federal agency; its employees are not Government employees. This means that even if appellants are right and the Court below was wrong in concluding that HAP and its representatives exercised due care during the flood period, no claim could be presented against the United States on that account.

E. FLOOD FIGHTING IS DISCRETIONARY ACTIVITY OUTSIDE TORT ACT JURISDICTION.

The Federal Courts have no jurisdiction, under the Tort Act, to award damages pursuant to "(a) any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an

employee of the Government, whether or not the discretion involved be abused." (28 U.S.C.A. 2680(a)). Congress, weary of the burden of private bills, removed the barrier of sovereign immunity to permit certain ordinary torts to reach the courts. But Congress did not intend to shift the traditional distribution of authority between the judiciary and the executive. To waive sovereign immunity is one thing; to permit the courts to reappraise every act or decision of every Government employee is quite another. Congress had no such purpose.

This has now been settled beyond argument by *Dalehite v. United States,* 346 U.S. 15, 35 (1953). That decision, dated subsequent to the decision below in these cases, rejected the Texas City disaster claims on the basis of the discretionary activity exemption of the Tort Act. Mr. Justice Reed said:

> "It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operation. *Where there is room for policy judgment and decision there is discretion.*" (Emphasis supplied.)

The last sentence is the key. "Where there is room for policy judgment and decision there is discre-

tion."[15] The situation created by the 1948 Columbia River flood obviously required an hour by hour exercise of judgment and hour by hour attention to flood fighting policy. How many men will the flood fight require? What materials should be on hand? How much equipment will be needed? Where should it be stationed? What provision should be made for an alarm? How could Vanport best be evacuated? How are the Vanport residents to be advised about evacuation plans? Should a bulletin be issued to them? What should the bulletin say? These are clearly policy and judgment questions. In similar fashion every question about the embankments called for the exercise of judgment. What patrols should be established? Who should do the work and how? What of the condition of the embankments? How well have they resisted flood pressure in the past? How well are they resisting flood pressure now? What is the significance of this seepage or that boil? No one of these questions could be answered except on the basis of an informed judgment discretionary and executive in nature.

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[15]Compare *Louisiana v. McAdoo,* 234 U.S. 627, 633 (1914):

> "But if the matter in respect to which the action of the official is sought, is one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official entrusted by law with its execution. Interference in such a case would be to interfere with the ordinary functions of government."

And Mr. Chief Justice Marshall in *Marbury v. Madison,* 1 Cranch 137, 170 (1803):

> "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion."

See also *Spalding v. Vilas,* 161 U.S. 483, 498 (1896); *Larson v. Domestic and Foreign Corp.,* 337 U.S. 682, 704 (1949).

Flood fighting and its problems are executive problems calling inevitably for "policy judgment and decision."

Prior to *Dalehite,* the Federal Courts on more than one occasion had rejected flood damage claims on the basis of the discretionary activity exemption of the statute. Mr. Justice Reed, in *Dalehite,* notes those decisions and approves them (346 U.S. 36). They include *Coates v. United States,* 181 F. 2d 816 (C.A. 8, 1950), where plaintiff had suffered $180,000 of damage as a result of alleged negligence of employees of the United States in constructing and operating flood control works along the Mississippi. The complaint was dismissed and the dismissal order affirmed. In *Olson v. United States,* 93 F. Supp. 150 (D.C. N.D., 1950), in *Lauterbach v. United States,* 95 F. Supp. 479 (D.C. Wash., 1951) and in *North v. United States,* 94 F. Supp. 824 (D.C. Utah, 1950), all noted in *Dalehite,* the claims were based upon negligence of Government employees in the operation of a Government dam. In each instance it was held that there was no jurisdiction because of the discretionary activity exemption. See also *Sickman v. United States,* 184 F. 2d 616 (C.A. 7, 1950); *Boyce v. United States,* 93 F. Supp. 866 (D.C. Iowa, 1950); *Toledo v. United States,* 95 F. Supp. 838 (D.C. Puerto Rico, 1951).

The examples could be multiplied but in appellee's judgment no elaboration is required to demonstrate that flood fighting is discretionary in nature and that the decisions of which appellants complain are fundamentally policy decisions. Indeed, it seems unlikely

that there has been any case in the courts which is as clearly within the discretionary activity exemption as these cases.

F. ALLEGED NEGLIGENCE OF PUBLIC OFFICIALS DURING A PERIOD OF PUBLIC PERIL IS NOT ACTIONABLE.

The *Dalehite* decision, 346 U.S. 15 (1953), recognizes that as a matter of substantive law the activity of public officials in a period of public peril, even though alleged to be negligent, is not actionable. In *Dalehite,* the trial court had found that following the Texas City explosion, the Coast Guard and its officials had been negligent in conducting fire fighting and rescue operations. The Supreme Court held that any such negligence was not actionable. Mr. Justice Reed said of the Tort Act (346 U.S. 43)

> "The Act did not create new causes of action where none existed before."

and went on to quote from the opinion in *Feres v. United States,* 340 U.S. 135 (1950):

> "We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities."

This means that a claim under the Tort Act is valid only if it meets the requirements of the statute and if, as a matter of substantive law, the claim exists. The *Dalehite* case is itself proof that, as a matter of sub-

stantive law, these claims do not exist. In *Dalehite* it was contended that employees of the Government were negligent in fighting a fire. Here it is contended that employees of the Government were negligent in fighting a flood. Both cases, therefore, raise the question as to whether, as a matter of substantive law, alleged negligence of public officials in a period of public peril is actionable. *Dalehite* answers that question no. In doing so it follows and accepts well settled common law principles.

The problem of liability in connection with efforts of public officials to avert a public calamity first arose in cases in which private property was seized and destroyed to protect the public. The rule of the common law was that the owner had no claim. "At the common law, everyone had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner." *Bowditch v. Boston,* 101 U.S. 16, 18 (1879). See, to the same effect, the *Saltpetre* case, 12 Co. Rep. 12, 77 Eng. Repr. 1294; *Surocco v. Geary,* 3 Cal. 69 (1853); *Field v. City of Des Moines,* 39 Ia. 575 (1874); *Dunbar v. Alcalde of San Francisco,* 1 Cal. 355 (1850); *Stone v. The Mayor and Aldermen of New York,* 25 Wend. 157 (1840); *The American Print Works v. Lawrence,* 23 N.J.L. Rep. 590 (1851); and the cases cited in *Dalehite,* 346 U.S. 43. The rule applies to flood fights. "We hold that appellants may not recover for damage caused by acts

of agents of the county in an attempt to control immediate danger from the flood. If it was necessary to use earth from appellants' property in filling sand bags to control the flood, respondents' agents and employees were justified in stripping the topsoil from appellants' property, and appellants cannot recover damages therefor." *Short v. Pierce County,* 78 P. 2d 610, 616 (Wash., 1938).

As the *Dalehite* decision recognizes, the rule against judicial review of emergency action by public officials includes the proposition that alleged negligence on the part of those officials vests no claim in private persons. The modern phrasing of the rule is frequently in terms of a distinction between "governmental" and "proprietary" activity. But whatever the phrasing, the result is the same. There can be no recovery. See, for example, *Perry et al. v. City of Independence,* 69 P. 2d 706 (Kan., 1937); *Cuffman v. City of Nashville,* 175 S.W. 2d 331 (Tenn., 1943); *City of Indianapolis v. Butzke,* 26 N.E. 2d 754 (Ind., 1940); *Brock-Hall Dairy Co. v. City of New Haven,* 189 A. 182 (Conn., 1937); *Barker v. City and County of Denver,* 160 P. 2d 363 (Colo., 1945); *Klassette v. Liggett Drug Co.,* 42 S.E. 2d 411 (N.C., 1947); *Rhodes v. Kansas City,* 208 P. 2d 275 (Kan., 1949); 9 A.L.R. 143; 33 A.L.R. 688; 84 A.L.R. 514.

In a recent collision case arising under the Public Vessels Act the Court of Appeals for the Third Circuit considered and decided a somewhat comparable question. In *P. Dougherty Company v. United States,*

..... F. 2d ..... (1953), the District Court held the United States liable for negligence of the Coast Guard in conducting rescue operations. The Court of Appeals reversed and said:

> "We cannot, however, subscribe to the District Court's ruling of law that the United States is liable for fault of the Coast Guard in conducting a rescue operation at sea.
>
> "We are of the opinion that public policy dictates that the United States should not be liable for fault of the Coast Guard in the field of rescue operations. There are two arrows in the quiver of this public policy. The first may be directed to the inevitable consequence on the morale and effectiveness of the Coast Guard if the conduct of its officers and personnel in the field of rescue operations under the indescribable strains, hazards and crises which attend them, is to be scrutinized, weighed in delicate balance and adjudicated by Monday-morning judicial quarterbacks functioning in an atmosphere of serenity and deliberation far from the maddening crowd of tensions, immediacy and compulsions which confront the doers and not the reviewers.
>
> "In its intramural aspects the Coast Guard functions, as do the other branches of the armed services, on a system of merits and demerits, promotions and demotions based on efficiency or lack of it, in their conduct and operations. A judicial determination that officers or men of the Coast Guard have been negligent in rescue operations would inevitably have a concomitant effect upon their service records. Aware of that fact,

the instinct of self-preservation would inevitably function even under the pressure of life or death crises which so often arise in rescue operations when members of the Coast Guard are called upon to make decisions. If men are to be brought to an abrupt halt in the midst of crisis—to think first that if they err in their performance they may expose their Government to financial loss and themselves to disciplinary measures or loss of existing status, and then to pause and deliberate and weigh the chances of success or failure in alternate rescue procedures, the delay may often prove fatal to the distressed who urgently require their immediate aid. Thus would the point of the second arrow in the quiver of public policy be blunted—the arrow which is directed to preserve in the public interest our merchant marine and that of other nations with which we trade.

"History establishes that tragic losses in men and ships all too frequently attend disasters at sea, and too often is it impossible to give successful succor despite the most gallant and efficient of efforts. To expose the men in the Coast Guard to the double jeopardy of possible loss of their own lives, and loss of status in their chosen careers, because they failed, in coping with the intrinsic perils of navigation, to select the most desirable of available procedures, or their skill was not equal to the occasion, is unthinkable and against the public interest."

Since the rule denying relief for alleged negligence in a period of public peril is a rule of substantive law, it survives, as *Dalehite* makes clear, statutes

such as the Tort Act which waive sovereign immunity. These cases, by express provision of the statute, are governed by Oregon law. 28 U.S.C.A. 1346(b). Oregon has consented, in general terms, to suits against the state "for an injury to the rights of the plaintiff arising from some act or omission of" various public officers. 8 O.C.L.A. 702. Nevertheless, the Oregon courts have consistently held that there can be no action against the state for negligence of Oregon officials acting in a governmental capacity. See *Blue v. City of Union,* 75 P. 2d 977 (Ore., 1938); *Noonan v. City of Portland,* 88 P. 2d 808 (Ore., 1938); *Antin v. Union High School District,* 280 Pac. 664 (Ore., 1929); *Johnston v. City of Grants Pass,* 251 Pac. 713 (Ore., 1926); *Asher v. City of Portland,* 284 Pac. 586 (Ore., 1930); *Wold v. City of Portland,* 112 P. 2d 469 (Ore., 1941); *Morris v. City of Salem,* 174 P. 2d 192 (Ore., 1946). New York, which has recently enacted a statute not unlike the Tort Act, has reached the same conclusion. *Steitz v. City of Beacon,* 64 N.E. 2d 704 (N.Y., 1945). So has California. *Stang v. City of Mill Valley,* 240 P.2d 980 (Cal., 1952).

The significance to these cases of the rule rejecting claims based upon alleged negligence of public officials in a period of public peril cannot be minimized. Appellants, to assert a claim under the Tort Act, must argue that the persons charged with negligence are employees of the United States. They are therefore public officials. Appellants are themselves vigorous in asserting that the peril created by the flood

was immediate and serious. The conclusion is inescapable that these claims are claims based on the alleged negligence of public officials in a period of public peril. The claims, for that reason, could not be allowed even though the negligence was proved. Emergency government action is not subject to judicial review.

G. CONGRESS HAS PROVIDED THAT THE UNITED STATES SHALL NOT BE LIABLE FOR FLOOD DAMAGE.

Claims against the United States on account of flood damage are not novel. Floods are one of the most persistent of the nation's problems. The loss is frequently tremendous. The 1948 Columbia River flood caused damage estimated at one hundred million dollars. The property loss in the recent Kansas City flood was approximately two and one-half billion dollars. "The average annual losses from flood damage in the United States have been estimated from 100 to 500 million dollars * * *" (H. Rep. No. 1092, 82d Cong. 1st Sess., p. 6). Congress has always been unwilling to become responsible for flood damage. In response to a suggestion that the Government undertake an indemnity program for the victims of the Kansas City flood, the House Committee said:

> "The budget request includes a proposal to indemnify flood victims for physical loss of or damage to tangible real or personal property up to 80 percent of the amount of such loss, provided that the amount to be paid any one person submitting such a claim does not exceed $20,000.

> The Committee heard considerable testimony on this recommendation, and after careful deliberation has not approved it for several important reasons.
>
> "Congress has never appropriated funds for indemnities such as have been proposed here in any previous disaster of this kind, and no legislation has ever been enacted by Congress authorizing such appropriations. This would be a major departure from the present concept of Government and, therefore, must be given more extensive study than is now possible under emergency conditions that demand prompt action on the part of the Congress. The Committee believes that the approval of the proposed indemnification program would commit the Federal Government to a new concept of Federal responsibility which would result in an almost unlimited number of claims from victims of every 'Act of God' disaster throughout the country regardless of the type or size of the disaster. The financial implications inherent in such an action would be enormous." (H. Rep. No. 1092, 82d Cong. 1st Sess., p. 5.)

The courts have been as unwilling as Congress to "commit the Federal Government to a new concept of Federal responsibility which would result in an almost unlimited number of claims from victims of every 'Act of God' disaster." For many years and in a wide variety of circumstances, claims have been filed under the Fifth Amendment seeking compensation for damage caused by the Government's

flood control operations. They have always been denied. *Bedford v. United States,* 192 U.S. 217, 224 (1904); *Jackson v. United States,* 230 U.S. 1, 23 (1913); *Cubbins v. Mississippi River Commission,* 241 U. S. 351 (1916); *Sanguinetti v. United States,* 264 U.S. 146 (1924); *United States v. Sponenbarger,* 308 U.S. 256 (1939); *Oklahoma v. Atkinson Co.,* 313 U.S. 508 (1941); *Gulf Refining Co. v. Mark C. Walker & Son Co.,* 124 F.2d 420 (C.C.A. 6, 1943); *United States v. West Virginia Power Co.,* 122 F.2d 733 (C.C.A. 4, 1941); *Goodman v. United States,* 113 F.2d 914 (C.C.A. 8, 1940); *Lynn v. United States,* 110 F.2d 586 (C.C.A. 5, 1940); *Franklin v. United States,* 101 F.2d 459 (C.C.A. 6, 1939). This is true even though the Federal officers, as an emergency measure, have dynamited levees, thereby inundating plaintiffs' property. *Hughes v. United States,* 230 U.S. 24 (1913); *Danforth v. United States,* 308 U.S. 271, 287 (1939).

This result does not depend upon doctrines of sovereign immunity or limitations in the Fifth Amendment. The Tennessee Valley Authority is subject to suit. Nevertheless, flood damage claims against it, even though asserted in terms of negligence or wrongful conduct, cannot be maintained. See *Grant v. T.V.A.,* 49 F. Supp. 564, 566 (1942). *Atchley v. T.V.A.,* 69 F. Supp. 952, 954 (1947). The decisive considerations are those of public policy. As Mr. Justice McKenna said in *Bedford v. United States,* 192 U.S. 217, 223 (1904):

> "The consequences of the contention immediately challenge its soundness . What is its limit? * * * And if the government is responsible to one landowner below the works, why not to all landowners? The principle contended for seems necessarily wrong. * * * Conceding the power of the government over navigable rivers, it would make that power impossible of exercise, or would prevent its exercise by the dread of an immeasurable responsibility."

To the extent that flood damage claims are founded upon the Fifth Amendment, they are, of course, beyond Congressional control. In the area, however, in which Congress is free to act, including the area of these cases, Congress has unequivocally forbidden recognition of such claims. The Court below concluded:

> "19. The provision of 33 U.S.C.A. 702(c) that 'No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place' is an absolute defense to these actions. The statute is valid; it is applicable to the Columbia River; and it was not repealed by the Federal Tort Claims Act."

In denying recognition to any claim against the United States on account of flood damage Congress was unequivocal and emphatic. And Congress meant exactly what it said.

Federal flood control legislation in this country goes back to 1851. In the general appropriation act

for that year Congress provided $50,000 "For the topographical and hydrographical survey of the Delta of the Mississippi * * *" (9 Stat. 523, 539). In 1879 the Mississippi River Commission was created and obligated to prepare for Congress "such plan or plans and estimates as will correct, permanently locate, and deepen the channel and protect the banks of the Mississippi River; improve and give safety and ease to the navigation thereof; prevent destructive floods; promote and facilitate commerce, trade, and the postal service; * * *" (21 Stat. 37, 38). In 1893 Congress created the California Debris Commission and instructed it to look into problems of navigability and flood control on California rivers (27 Stat. 507). In 1917 by an Act "To provide for the control of the floods of the Mississippi River and of the Sacramento River, California," Congress appropriated forty-five million dollars to be expended for flood control purposes (at the rate of ten million dollars a year) under the direction of the Secretary of War and in accordance with plans of the Mississippi River Commission and the California Debris Commission (39 Stat. 948). And thus the matter stood until 1927.

In 1927 the Mississippi Valley was devastated by its flood of record. Congress immediately gave consideration to flood control measures, culminating in the Flood Control Act of 1928 (45 Stat. 534) entitled "An Act for the Control of floods on the Mississippi River and its tributaries, and for other purposes."

Section 1 establishes a board of engineers to study Mississippi problems. Section 2 approves the principle of local contribution to the cost of flood control with specific exceptions. Section 3, paragraph one, obligates local interests to provide easements and rights of way and to assume responsibility for the maintenance and operation of the levee structures to be built under the Act. The second paragraph of Section 3 contains the language which now appears as Section 702c of Title 33. That paragraph reads as follows:

> "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands."

The statute goes on to provide for acquisition of flowage rights by the United States, for participation

of various Government agencies in work to be done under the Act, for distribution of funds in connection with the Mississippi program, for further reports and studies and, finally, for a limitation on the contribution of the United States to flood control measures proposed by the California Debris Commission for California rivers.

The no-liability language of Section 3 came into the Act as a result of a conference between the House and Senate managers and without explanation (see H. Rep. No. 1505, 70th Cong., 1st Sess.). But it is not difficult to identify the source of this provision. President Coolidge in his 1927 State-of-the-Union message (Cong. Rec. Sen., Dec. 7, 1927, p. 106) reviewed the problems created by the 1927 flood, proposed additional flood control legislation, and added words of caution about the position of the Government. He said:

> "It is necessary to look upon this emergency as a national disaster. It has been so treated from its inception. Our whole people have provided with great generosity for its relief. Most of the departments of the Federal Government have been engaged in the same effort. The governments of the afflicted areas, both State and municipal, can not be given too high praise for the courageous and helpful way in which they have come to the rescue of the people. If the sources directly chargeable can not meet the demand, the National Government should not fail to provide generous relief. This, however, does not mean restoration. The Government is not

> an insurer of its citizens against the hazard of the elements. We shall always have flood and drought, heat and cold, earthquake and wind, lightning and tidal wave, which are all too constant in their afflictions. The Government does not undertake to reimburse its citizens for loss and damage incurred under such circumstances. It is chargeable, however, with the rebuilding of public works and the humanitarian duty of relieving its citizens from distress."

This is clear enough: the Federal Government will extend its flood control program and provide relief where relief is needed; but it will not pay for flood damage. Section 3 was intended to put this point beyond argument. And it does so. There is no conflicting view. See *United States v. Sponenbarger,* 308 U.S. 256, 269 (1939); *Kincaid v. United States,* 35 F.2d 235, 246 (D.C. W.D. La., 1929).

Appellants argued in the Court below that Section 702c has no application in the Columbia River Basin. That argument has no force. 1. The 1928 Act, relating as it did to flood control on the Mississippi and Sacramento Rivers, related to all flood control work which the Government had undertaken in the past or was proposing for the future. Hence, in providing against liability in this statute, Congress was, in effect, providing against all liability. 2. The provision itself, referring as it does to "damage from or by floods or flood waters *at any place",* specifically negatives appellants' idea of a limited geographical application. 3. President Coolidge in his message to

Congress was obviously suggesting policy for all flood activities of the Government, wherever located. 4. The Flood Control Act of 1936, which included provision for work in the Columbia River Basin, specifically affirmed all the provisions of the 1928 statute, thus making it plain that Section 702c has full application in the Columbia River Basin. Prior to 1936 the 1928 Act was amended from time to time in minor particulars (46 Stat. 787, 47 Stat. 810, 48 Stat. 607, 49 Stat. 1508); but there was no new general flood control legislation until that year. In 1936 Congress greatly extended the flood control activities of the Government approving many projects, including approximately fifty in the Columbia Basin (49 Stat. 1570, 1589). Congress was careful, however, to reaffirm the principles and provisions of the 1928 Act. Section 8 of the 1936 statute (49 Stat. 1570, 1596) provides:

> "Nothing in this Act shall be construed as repealing or amending any provision of the Act entitled 'An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes', approved May 15, 1928, or any provision of any law amendatory thereof. * * *"

Thus it is beyond dispute that Congress intended that all provisions of the 1928 Act, including the no-liability provision, should apply in the Columbia Basin. Since 1936 there has been a variety of flood control statutes of one kind or another but nothing to modify this conclusion. (See 52 Stat. 1215, 53 Stat. 1414, 55 Stat. 638, 58 Stat. 887, 60 Stat. 641, 62 Stat. 1040).

Appellants argue that Section 702c has been modified by the Tort Act. This argument, as the Court below concluded, has no merit. 1. The Tort Act did no more than to waive the defense of sovereign immunity. It did not repeal existing acts of Congress or create claims against the United States which did not theretofore exist. *Feres v. United States,* 340 U.S. 135 (1950). 2. By its terms the Tort Act did not repeal or modify Section 702c and the most that could be said, therefore, is that there has been a repeal by implication. "But it is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only pro tanto to the extent of the repugnancy." *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 456 (1945); *United States v. Borden,* 308 U.S. 188, 198 (1939). It is uniformly held, moreover, that a later statute written in general terms, such as the Tort Act, will not (absent an express provision) be construed to supersede an earlier specific statute, such as Section 702c relating to liability for flood damage. "It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute." *Rodgers v. United States,* 185 U.S. 83, 87 (1902); *Stewart v. United States,* 106 F. 2d 405, 408 (C.C.A. 9, 1939); *United States v. Hughes,* 116 F. 2d 171, 174 (C.C.A. 3, 1940); *The Town of Okemah v. United States,* 140 F. 2d 963, 965

(C.C.A. 10, 1944); *Home Owners Loan Corporation v. Creed,* 108 F. 2d 153, 155 (C.C.A. 5, 1939).

The provisions of 33 U.S.C.A. 702c are an absolute bar to these claims.[16]

H. THE POSITION AND ARGUMENT OF APPELLANTS.

The appellants in the consolidated cases are thirty-eight Vanport residents who came to Vanport on a date and for reasons undisclosed. Since by May 30, 1948 the war was long since over, the Vanport housing no longer served any Government purpose and the appellants were then ordinary civilians holding ordinary civilian jobs, such as automobile dealer (Tr. 54), radio repairman (Tr. 72), laborer (Tr. 97), teacher (Tr. 110), postal clerk (Tr. 120), student (Tr. 128), telephone installer (Tr. 138), accountant (Tr. 155), painter (Tr. 199), secretary (Tr. 215), warehouseman (Tr. 225), salesman (Tr. 270), accountant (Tr. 290),

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[16]Appellants call attention to a single sentence in a committee report referred to in *Dalehite v. United States,* 346 U.S. 15, 29 (1953) discussing the fact that under the discretionary activity exemption of the statute no suit can be maintained "against the Government growing out of an authorized activity, such as a flood control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid." It is hard to know what this sentence means. The fact is that if the discretionary activity exemption applies, there is no liability under the Act, negligence or no negligence. 28 U.S.C.A. 1346(b). In any event, the committee reference is to an authorized "flood control or irrigation *project*"—something quite different from the flood damage claims to which Section 702(c) refers.

logger (Tr. 304), teacher (Tr. 339) and salesman (Tr. 348).

At the trial appellants conceded that during the flood period they knew Vanport was surrounded by water and that an embankment failure meant that the project would be flooded (Tr. 36, 46, 80, 92, 104-5, 114, 124, 146, 152, 164, 210, 221, 233, 242, 261, 299, 345). This testimony, as the District Court concluded, can mean only one thing: that appellants assumed the risk of flood damage. The Court below found

> "15. Responsibility for the safety of property at Vanport during the flood period rested with the individual owners of the property and not with the United States. Each plaintiff was in a position to obtain full information concerning the height of the flood waters in the Columbia River and it is a matter of common knowledge that floods sometimes overtop and break down protective works and dikes. Under the circumstances each plaintiff had the option of moving his property or gambling upon the coming events. Plaintiffs failed to make a proper choice but that does not create a ground for liability against the United States."

and concluded:

> "16. Under the law of Oregon each plaintiff was responsible for the safety of his property at Vanport during the flood period and each plaintiff, by failing to remove his property from Vanport, took the risk that it might be damaged by flood waters."

There is no escape from this conclusion. The obligation of a defendant to protect a plaintiff is no greater than the plaintiff's obligation to protect himself. "The law imposes upon a person sui juris the obligation to use ordinary care for his own protection, the degree of which is commensurate with the danger to be avoided." *Carroll v. Grande Ronde Electric Co.,* 84 Pac. 389, 394 (Ore., 1906); *Morris v. Fitzwater*, 210 P. 2d 104 (Ore., 1949). Appellants knew of the high water and that an embankment failure meant a flood. They were entirely free to leave Vanport with their property whenever they saw fit. They chose to stay. They assumed the risk. Compare *Chesapeake & O. Ry. Co. v. Salyer,* 113 S.W. 2d 1152, 1157 (Ky. App., 1938) holding that tenants leasing property subject to overflow assumed the risk of flood damage.

The opening brief argues that under Oregon law the rule of res ipsa loquitur applies to these cases. The Court below reached the contrary conclusion:

> "12. Under the law of Oregon the rule of res ipsa loquitur is not applicable to these cases and in any event there is evidence in the record adequate to rebut any presumption of negligence which might arise out of that rule."

The position of the District Court seems clearly correct. For one thing, the western embankment, the embankment which failed, was not built by the United States and on May 30, 1948 it was in actual fact in the control of the railroad companies and not in the control of the Government. Moreover, information as to the condition of the western embankment was

not in the exclusive control of anyone. The embankment was regularly inspected not only by the representatives of the Corps of Engineers (Tr. 519-21, 499-508) but by the representatives of the district (Tr. 555-7), HAP (Tr. 519-22), the railroad companies (Tr. 864-72, 785-99, 852-57) and, of course, by the Vanport residents themselves (Tr. 794). The res ipsa rule is intended to provide assistance to a plaintiff who has no access to the information relevant to his claim. Here the access of the United States to the facts concerning the western embankment and its failure is no better and no different from the access of appellants to those facts. The res ispa rule, furthermore, only applies in a situation in which on the basis of past experience it can be said with some assurance that absent negligence an accident does not take place. No one could possibly say that as a general thing levee failures are caused by negligence. Finally, the res ipsa doctrine, even where it applies, does not, as appellants seem to think, create a conclusive presumption of negligence. On the contrary, res ipsa does no more than to create an inference, an inference which disappears when the circumstances are fully explained. *Dunning v. Northwestern Electric Co.,* 206 P. 2d 1177, 1191 (Ore., 1949); *Herzinger v. Standard Oil Company,* 190 F. 2d 695 (C.A. 9, 1951). Here the record contains a detailed statement of everything about the western embankment, its history and condition. There is no room for inference or speculation and hence no room for res ipsa considerations.

None of the cases cited in the appellants' brief provides support for their postion. *Maryland v. Manor Real Estate & Trust Co.*, 176 F. 2d 414 (C.A. 4, 1949), the case upon which appellants chiefly rely, presented a situation quite unlike the situation here. Baltimore houses belonging to Manor Co. were leased to the United States acting through Public Housing Authority (PHA). PHA contracted with Dugan to manage the property on its behalf, an arrangement which continued until January 1, 1947. On that date PHA sub-leased the premises to Mazer who assigned his interest to Calvert Village, Inc. Plaintiff's husband moved into the property in February, 1946 and remained there until he contracted typhus and died January 23, 1947. Judgment went in favor of Manor Co., the owner of the premises, and Mazer and Calvert Village, the sub-lessees, on the ground that no negligence on their part was shown. It was held, however, that Dugan was negligent in failing to use due care to eliminate a known infestation of typhus carrying rats and that the United States was responsible for this negligence. The rats were in the basement of the building, a portion of the premises remaining in Government control. Dugan, the person found to be negligent, was a contract employee of the United States.

There is nothing remarkable about this case and nothing about it is of any assistance to appellants. The decision is based on demonstrated negligence by

a Government employee. The duty of the Government arose from the ordinary rule that a landlord who leases portions of a building to various tenants must use due care to keep cellars, stairways and basements in a safe condition. The Vanport situation was not at all comparable. Vanport was not managed by a Government employee. It was leased to the Housing Authority of Portland. The damage to appellants at Vanport did not result from any difficulty with the basement of the apartment buildings. It resulted from the condition of railroad fills for which the United States had no responsibility. Moreover, the negligence of Dugan in the *Manor* case was obvious and flagrant. Here there was no negligence.

Of the other cases cited by appellants three, *Senner v. Danewolf,* 6 P. 2d 240 (Ore., 1932), *Staples v. Senders,* 101 P. 2d 232 (Ore., 1940), and *Garrett v. Eugene Medical Center,* 224 P. 2d 563 (Ore., 1950), are all conventional landlord-tenant cases announcing rules having no application here. *Longbotham v. Takeoka,* 239 Pac. 105 (Ore., 1925) is, as the District Court pointed out, authority for the view that the law of landlord and tenant is irrelevant to the cases before this Court. Appellants cite four more Oregon decisions: *Massey v. Seller,* 77 Pac. 397 (Ore., 1904), which has to do with the liability of the owner of the premises to a business invitee for negligence in failing to guard an elevator shaft; *Boardman v. Ottinger,* 88 P. 2d 967 (Ore., 1939), relating to the liability of

the owner of an amusement park for negligence of his patrons; *Suko v. Northwestern Ice Co.*, 113 P. 2d 209 (Ore., 1941), having to do with liability for damage resulting from the bursting of a tank in which the defendant stored water; and *Gow v. Multnomah Hotel,* 224 P. 2d 552 (Ore., 1950), in which the plaintiff was injured by the collapse of a counter stool. None of these decisions has any bearing upon the problem before this Court. Appellants cite no authority which supports their position. There is none.

Apellants lost their property as a consequence of a flood in the Columbia River, an Act of God. The flood, except for one prior occasion, was of unprecedented proportions. It was tremendously destructive. Four hundred thousand acres of land were inundated, 70,000 people were rendered homeless and the property damage reached $100,000,000. No one can fail to sympathize with appellants and the thousands of others who suffered on account of the flood. Sympathy with appellants, however, is one thing; a conclusion that the United States must pay for the flood damage is quite another. For the reasons explained by the District Court and described at greater length in this brief, no damage claim against the United States exists.

The judgment below was correct and it should be affirmed.

Dated, December 7, 1953.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

In the District Court of the United States for the District of Oregon

Civil No. 4420

Solon B. Clark, Jr. and Geraldine A. Clark, husband and wife,
Plaintiffs,
vs.
The United States of America,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

These cases (Nos. 4420, 4449, 4450, 4451, 4468, 4469, 4599, 4607, 4775, 4785, 4882, 4928, 5054, 5122, 5469, 5475, 5484, 5498, 5499 and 5532) were consolidated for trial during August, 1951, before the above entitled Court, the Honorable James Alger Fee, Chief Judge, presiding, and sitting without a jury. The parties appeared by their respective counsel and introduced evidence, both oral and documentary. The cases were briefed and argued and submitted to the Court for consideration and decision. After due consideration the Court, being fully advised, makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT.

1. The Court by this reference adopts as part of these findings of fact, the findings of fact in the opinion of the court in the consolidated cases and the statement of agreed facts set forth in paragraphs 1 to 31, inclusive, of Section C of the pre-trial order on file in these consolidated cases.

2. During the early part of the war Vanport, a large housing project located in Multnomah County, Oregon, was built at the expense of the United States to provide housing during the war period for employees of the Kaiser shipyards located in or near Portland, Oregon. Vanport was situated within Peninsula Drainage District No. 1, a municipal corporation organized for drainage and flood protection purposes. The Drainage District was bounded by four embankments: on the north and south by embankments built by the District and rebuilt by the Corps of Engineers of the United States Army; on the east by an embankment supporting an Oregon State Highway known as Denver Avenue; and on the west by an embankment built in the period from 1910 to 1918 by the Spokane, Portland and Seattle Railway Company and the Union Pacific Railroad Company (or their predecessors in interest) for the purpose of carrying trains and not for flood protection. All the land in Peninsula Drainage District No. 1 would have been covered to a considerable depth during mean high water in the Columbia River if it had not been for the three exterior embankments, the embankments on the north, south and west. The United

States, at or about the time Vanport was constructed, condemned and acquired the ownership of about 80% of the land in the Drainage District, including the land on which Vanport was located. The United States also purchased and operated the pumping system of the District.

3. The Columbia River rises in British Columbia and flows 1,210 miles to the Pacific Ocean. It is subject to floods culminating usually in June. In the period from 1858 to 1947 the flow at The Dalles, Oregon, has exceeded 900,000 feet per second in 1862, 1876, 1880 and 1894. These figures are of public record and available to everyone.

4. In May and June of 1948 the Columbia River was in flood. The flood involved both the Columbia River and its tributaries and more than 50 cities and towns were affected. The flood rendered 70,000 people homeless and 5,000 homes were destroyed. More than 400,000 acres were inundated and 41 persons lost their lives. Property damage exceeded $100,000,000. The flood fight involved 475 miles of levees protecting approximately 200,000 acres of land. During the flood more than 10,000 persons, including 1,200 Army troops, Navy personnel, National Guard troops and members of the Coast Guard, participated in the flood fight.

5. The public and private agencies actively engaged in the flood fight or disaster relief at Vanport were the State of Oregon and its agencies, the County of Multnomah and its agencies, the American National Red Cross, the Housing Authority of Portland, the

United States Army Engineers, property owners in the Vanport area, Peninsula Drainage District No. 1, the Sixth Army of the United States and the Coast Guard. The United States Weather Bureau also co-operated in various capacities.

6. At approximately four thirty on Sunday afternoon, May 30, 1948, and when the flood water in the Columbia River stood at an elevation of 30.8 feet, m.s.l., the western embankment at Peninsula Drainage District No. 1 suddenly failed. The failure resulted from a break in the embankment rather than over topping. The failure was so rapid and unexpected that railroad employees who were inspecting the embankment were precipitated into the water. Within an hour the whole Vanport area was flooded. The houses in Vanport were damaged beyond repair and personal property belonging to the Vanport residents, including property of the plaintiffs, was destroyed by water damage as a direct result of the break. Fourteen lives are reputed to have been lost but about 16,000 people were evacuated safely.

7. The western embankment was constructed, owned and operated by the railroad companies and not by the United States. At the point where the embankment failed it had an elevation of 47.3 feet, a crown width of 75 feet and a thickness of 120 feet at the water level. It was much larger in section than the other embankments surrounding Vanport and at the time of failure the water was more than 15 feet from the top of the structure. Although the embankment has been examined in detail, together with

the character of the ground where it was built and the materials and methods used in its construction, the cause of the failure has not been shown and appears to be unknown.

Prior to 1948 the western embankment had withstood the floods of 1933 of 27.7 feet, of 1928 of 27.6 feet, of 1921 of 27.4 feet and other floods of less height. The alleged fact that there were decayed timbers in the fill and that ordinary sand was used in its construction has not been proved to have had any effect. No one thought there was a possibility that the western embankment would fail since it was higher, broader, less subject to pressure of water and was thought to be better consolidated because of the pressure of tremendous weight which it continuously bore. The United States did not own, construct, maintain or operate the western embankment which failed under pressure of the Columbia River Flood waters on May 30, 1948. This embankment had been constructed, maintained and operated by the Railroad Companies for many years and was used for carrying trains of enormous weight up to the very moment of disaster and was not constructed primarily for the purpose of flood control. It was also protected by a highway fill of less height which ran between it and the river under ordinary water conditions. No cause for the failure of the western embankment has been proved. No act or omission of the United States, the Corps of Engineers, the Housing Authority of Portland, the railroads and the agencies, officers or employees of any of them in connection with the flood-

ing of plaintiff's property was without due and ordinary care. No act or omission of any such person or entity above named was the cause of the flooding of the property of the plaintiff.

The Corps of Engineers, the engineers of the railroad companies who had charge of the original construction and present management of the fill, the Housing Authority of Portland and its executive and administrative employees, together with the representatives of the State, community and national relief organizations, as well as individual residents of Vanport who testified at the trial, all saw no reason to apprehend danger and all believed that the western embankment would stand. No care or precaution could have given notice that any break would occur. There has been no proof of negligence in connection with the construction, maintenance or operation of the western embankment.

8. The Corps of Engineers is an agency or instrumentality of the United States in its sovereign capacity. For many years the Corps has helped to protect the nation from floods. Many levees and embankments have been constructed by the Corps or under its supervision. During the 1948 Columbia River flood, as on innumerable other occasions, the Corps, owing to the high competence of its officers and engineers, helped in the effort to control the flood waters not only in the Vanport area but up and down the Columbia River for a distance of five hundred miles. In that connection the Corps gave general publicity to the approaching high water and main-

tained a careful and consistent inspection of the areas and dikes involved, including those at Vanport. Within the limits of available personnel, the Corps also gave technical advice and assistance to those participating in the flood fight. However, the Corps did not take charge of the flood fight at Vanport; nor did the Corps attempt to guarantee the safety of the dikes at Vanport or elsewhere. All the acts done and advice given by the Corps and its representatives and employees in this situation of widespread peril to the public were honest and competent. No negligence on the part of the Corps of Engineers, its employees or representatives, has been proved. The Corps of Engineers and its representatives neither had nor assumed any obligation to be responsible for the safety of the Vanport residents or their property and no duty was imposed upon the United States by the activities of the Corps.

9. On May 30, 1948, the properties of the Spokane, Portland and Seattle Railway Company and the Union Pacific Railroad Company were under technical "seizure" by the United States in connection with a labor dispute resulting in an alleged national emergency. The "seizure" of the properties of these railroads was a fiction of the flimsiest kind. That "seizure" did not in fact affect in any way the ownership or control of the railroads or their properties, including the ownership or control of the western embankment at Vanport. No duty on the part of the United States to maintain the western embankment for flood protection purposes, or at all, arose out of this so-

called "seizure." Moreover, no act or omission of any employee of the railroads has been proved which constituted negligence. The officers and employees of the railroads, whether under federal control or not, acted in the light of all available knowledge as to the construction of the fill, the materials used and the nature of the underlying ground. As operators of railroads they acted with respect to the safety of their passengers and freight under a duty almost absolute. Yet trains passed over this fill at the regularly established intervals all during the flood period and up until half an hour before the break occurred. The United States did not build, maintain or operate the western embankment and had no responsibility therefor. Inspections of the embankment were made with meticulous care. Precautions were taken. All the indicia of disaster now pointed up by the event were appraised at the time by the railroads' representatives in the light of their duty to their own passengers and freight and of their knowledge of the nature of the fill. The event proved them wrong but not negligent.

10. On May 30, 1948, the Federal Public Housing Authority, an agency of the United States, had by written document turned over management of Vanport to the Housing Authority of Portland, an instrumentality of the Oregon State government created under the authority of an Oregon statute. The Housing Authority managed Vanport in the interest of the Federal Public Housing Administration which issued directives and had control of policies relating to the renting, financial management and supposed

welfare of the inhabitants. The Housing Authority was a federal agency and with respect to the management of Vanport it was acting as an agency of the United States.

11. No negligence on the part of the Housing Authority or its agents or employees has been proved. They carefully inspected the embankments surrounding Vanport and took care of weaknesses which developed or assisted others therein. They established patrols of the embankments and kept watch of the height of the water on all sides. Efficient arrangements were made, moreover, for the evacuation of all persons in the case of necessity. The proof of the care used in this regard is that Vanport was evacuated unexpectedly in a period of about an hour of some 16,000 people with small loss of life.

12. The United States as owner of Vanport and as landlord of the residents of Vanport, had no control over the premises leased to the Vanport tenants and no duty to protect the tenants from fire, floods or other public calamities. There is no proof that the United States as landlord and owner of Vanport failed to perform any duty owing from it to the Vanport tenants. No agent or employee of the United States has been proved to have been negligent in anything which was done or which was not done in connection with the flood situation.

13. The agents and employees of the United States and of the Housing Authority assumed no duty in connection with the flood situation which they failed

to discharge. The bulletin distributed to the residents of Vanport on Sunday morning, May 30, 1948, did not guarantee that Vanport would not be flooded. On the contrary, the bulletin, by describing plans for the evacuation of Vanport, made it clear that flood was a possibility. It was emphatic in saying that if a flood came there would be no opportunity to remove property situated in Vanport unless one happened to be on the spot at the time and then that only a few valuable possessions and a change of clothing could be saved. There was no holding out or assumption of duty to give the Vanport tenants ample time to evacuate their property. No negligence has been proved in connection with the bulletin or the statements made in it.

The United States, its officers, agencies, and employees as landlord of plaintiffs and as owner of Vanport all acted with due and ordinary care in all things connected with the flooding and damage of property of plaintiffs. No such act or omission in said capacity was the cause of the flooding of the property of plaintiff.

14. The United States had no control over or responsibility for the flood waters of the Columbia River or for the western embankment at Vanport and obviously the United States did not impound the flood waters upon its property for its own use and thereafter fail to restrain their propensity for damage. The United States did not impel the water which damaged plaintiffs' property.

15. Responsibility for the safety of property at Vanport during the flood period rested with the individual owners of the property and not with the United States. Each plaintiff was in a position to obtain full information concerning the height of the flood waters in the Columbia River and it is a matter of common knowledge that floods sometimes overtop and break down protective works and dikes. Under the circumstances each plaintiff had the option of moving his property or gambling upon the coming events. Plaintiffs failed to make a proper choice but that does not create a ground for liability against the United States.

16. The 1948 Columbia River flood was an act of God for which the United States has no responsibility.

17. Plaintiffs have failed to prove any negligence or wrongful act or omission by any employee of the United States or that plaintiffs suffered damage on that account.

18. Plaintiffs have failed to prove facts sufficient to justify a judgment against the United States on the theories upon which they rely, that is, theories of absolute liability, trespass, negligence, res ipsa loquitur and assumption of duty, or at all.

19. The contentions of plaintiffs as set out in the pre-trial order that the United States had or assumed a duty to protect plaintiffs' property, that the United States, its agents or employees, were guilty of negligence or wrongful conduct in the particulars there set forth, or at all, that the western embankment at Vanport was a nuisance, that the Corps of Engi-

neers had or failed to discharge any obligation arising out of Regulations 208, that the doctrine of res ipsa loquitur applies to these cases, or that the plaintiffs relied for the safety of their property on assurances by the United States or its agents or employees have not been proved.

20. The United States has proved facts sufficient to establish its defenses, that is, that it had no duty to protect plaintiffs' property, that there is no evidence of negligence or of any wrongful act or omission on the part of any agent or employee of the United States, that the agents and employees of the United States during the flood period were acting in a period of public emergency and exercising their discretion in that connection, and that no agent or employee of the United States assumed any duty in connection with plaintiffs' property which was not discharged.

CONCLUSIONS OF LAW

1. The Court by this reference adopts the conclusions of law set forth in the opinion of the court heretofore filed herein.

2. The jurisdiction of this Court is invoked under the provisions of the Federal Tort Claims Act.

3. The legal rights and duties of the parties to these actions depend upon the Federal Tort Claims Act and the law of Oregon.

4. Under the law of Oregon there are three requisites for recovery of damages: (a) a duty incumbent upon the defendant, (b) a breach of that duty by

the defendant, and (c) injury and damage resulting proximately from the breach of duty.

5. Neither the United States nor any of its agents or employees owed a legal duty to protect plaintiffs' property under the circumstances of these cases.

6. No negligence has been proved in connection with the construction, maintenance or operation of the western embankment at Vanport, the embankment which failed under pressure of Columbia River flood waters on May 30, 1948. Moreover, the western embankment was constructed, owned and operated by the railroad companies and not by the United States.

7. The United States had no duty to plaintiffs in regard to flooding or damage to property of plaintiffs thereby. No act or omission of the United States and of its agencies, officers or employees had causal connection with regards to flooding or damage to property of plaintiffs thereby. Neither the United States nor any of its agents, officers, or employees assumed any duty or liability to plaintiffs in regard to flooding or damage of the property of plaintiffs thereby. The United States had no duty to plaintiffs on account of the construction, ownership, maintenance or operation of the western embankment or on account of the May 1948 flood of the Columbia River.

8. Neither the United States nor any of its agents or employees assumed any legal duty which was not fully discharged.

9. Neither the United States nor any of its agents or employees has been proved to be guilty of any

negligence or wrongful conduct within the meaning of the Federal Tort Claims Act.

10. Under the law of Oregon there is no liability without fault under the circumstances of these cases.

11. Under the law of Oregon there is no liability for trespass under the circumstances of these cases.

12. Under the law of Oregon the rule of res ipsa loquitur is not applicable to these cases and in any event there is evidence in the record adequate to rebut any presumption of negligence which might arise out of that rule.

13. Under the law of Oregon no person has responsibility for a natural stream flowing in its bed whether in flood or not.

14. Under the law of Oregon a person who erects a dike or embankment for flood protection or other purposes has no duty under the circumstances of these cases to maintain that dike or embankment carefully or at all for the benefit of those who own or occupy property in a location which it appears to protect.

15. Under the law of Oregon a landlord has no duty to protect his tenants against fire, floods or other public calamities.

16. Under the law of Oregon each plaintiff was responsible for the safety of his property at Vanport during the flood period and each plaintiff, by failing to remove his property from Vanport, took the risk that it might be damaged by flood waters.

17. The so-called seizure by the United States of the properties of the Spokane, Portland and Seattle Railway Company and the Union Pacific Railroad Company during May and June, 1948, was a mere formality which did not affect the ownership or control of the western embankment at Vanport and which did not impose any duty upon the United States in favor of plaintiffs.

18. There was no breach of any duty owing from the United States as owner of Vanport to these plaintiffs.

19. The provision of 33 U.S.C.A. 702(c) that "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place" is an absolute defense to these actions. The statute is valid; it is applicable to the Columbia River; and it was not repealed by the Federal Tort Claims Act.

20. The United States is entitled to judgment.

21. Each party shall bear his or its own costs of suit.

These findings of fact and conclusions of law are in accordance with the pre-trial order, the record made on the trial of the actions and the opinion of the Court heretofore filed in these consolidated cases.

Dated this 29th day of January, 1953.

James Alger Fee,
United States District Court Judge